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P

Rebuck for Arnold
Evans Board

New York (State) Reports.
in

REPORTS

OF

PRACTICE CASES,

DETERMINED

IN THE

COURTS OF THE STATE OF NEW YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD NEW YORK REPORTS ISSUED DURING THE PERIOD COVERED BY THIS VOLUME.

BY ABBOTT BROTHERS,
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VOL. XVII.

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ABBOTTS'

PRACTICE REPORTS.

NEW YORK.

WARD *a.* BEEBE.

Supreme Court, First District; General Term, Oct., 1863.

SUPPLEMENTARY PROCEEDINGS.—PROPERTY IN HANDS OF THIRD PERSON.—NOTICE TO JUDGMENT-DEBTOR.—SATISFACTION OF JUDGMENT.

In proceedings supplementary to execution, under sections 294 and 297 of the Code of Procedure, against a person having property of a judgment-debtor, it is discretionary with the judge whether notice of the proceedings shall be given to the judgment-debtor.*

A judgment may properly be satisfied of record by an order of the court, although such judgment has been previously discharged of record by filing a satisfaction-piece, where such satisfaction-piece was given conditionally, and not in full discharge of the demand.

Appeal from an order directing that a judgment be satisfied of record.

Judgment was recovered in this action by Henry W. Ward against Welcome R. Beebe and Elisha Ruckman for $610.40. Ruckman was a judgment-creditor of Ward's in another action. Supplementary proceedings under section 294 of the Code of

* See, also, Holmes *a.* Jordan, 15 *Ante*, 410, *note;* Parker *a.* Hunt, *Ib.;* Ward *a.* Beebe, *Ib.*, 372. To the contrary, Lord *a.* Ford, *Ib.*, 409, *note.* Compare Gibson *a.* Haggerty, *Ib.*, 406.

Procedure were instituted against Beebe in Ruckman *a.* Ward, but no notice of the proceedings was given to Ward or his attorney. It appearing on the examination of Beebe that he was indebted to Ward upon the judgment in Ward *a.* Beebe, an order was made that Beebe pay to Ruckman the amount of the judgment in Ruckman *a.* Ward. This order was complied with, and Beebe subsequently paid the balance due upon the present judgment, deducting the amount paid Ruckman. (15 *Ante*, 372.) At the time of making this payment, Beebe took a satisfaction-piece from Ward, and executed the following stipulation:

[*Title of the cause.*]

Whereas the plaintiff in this action has, for my accommodation, satisfied the judgment therein, although only the sum of $415.79 has been received by him thereon: Now therefore, in consideration thereof, I hereby promise to pay the balance of said judgment, being $610.40, unless I obtain from this court an order that said judgment be cancelled or satisfied upon the record within thirty days from the date hereof; and in case such order be set aside by the court, or reversed on appeal, then, and in either of such cases, I agree to pay such balance of said judgment on demand.

[*Date.*] [*Signature.*]

The judgment in Ward *a.* Beebe was then satisfied by order of the court.

From this order Ward appealed.

Isaiah T. Williams, for the appellant.

Beebe, Dean & Donohue, for the respondents.

By the Court.—Sutherland, P. J.—The order made at special term, authorizing and directing the clerk to satisfy the judgment in this action of record, appealed from, was founded on the proceeding supplemental to the executions issued on the judgments of Ruckman against Ward, under section 294 of the Code, and on the order made in the last-mentioned proceeding, and on proof that the last-mentioned order had been complied with,—that is, that Beebe had paid on the 29th of April, 1862,

$415.79, on account of the judgment of Ward against Ruckman and Beebe, and had subsequently paid to the sheriff $247.41, the amount due on the judgments of Ruckman against Ward, as the balance due on the judgment of Ward against Ruckman and Beebe, including sheriff-fees.

The order under which Beebe paid the $247.41 in satisfaction of the judgment against him and Ruckman, was made without notice to either Ward or his attorney, Mr. Williams, of the proceeding in which that order was made. As to Ward, the judgment-debtor, the order was entirely *ex parte.*

Unless this want of notice rendered that order not only irregular, but void, as to Ward, the order appealed from, directing satisfaction of the judgment against Ruckman and Beebe, certainly was not erroneous, although under the circumstances it may have been unnecessary.

Section 294 of the Code expressly declares that the judge may, "in his discretion, require notice" of the proceeding under that section, "to be given to any party to the action, in such manner as may seem to him proper." (See, also, Kemp *a.* Harding, 4 *How. Pr.*, 178; Seely *a.* Garrison, 10 *Abbotts' Pr.*, 460; Foster *a.* Prince, 8 *Ib.*, 407.)

The order, then, under which Beebe paid the $247.41, the amount of Ruckman's judgments against Ward, in satisfaction of the balance due on the judgment against Beebe and Ruckman, was not irregular, much less void, for want of notice to Ward or his attorney of the proceeding in which that order was made, for it was a matter within the discretion of the judge whether such notice should be given or not.

If, when that proceeding was instituted, the judgment against Ruckman and Beebe equitably belonged to Mr. Williams, the attorney of Ward, and the proceeding was instituted in fraud of Williams' rights as such equitable owner, perhaps the order made in that proceeding might have been stayed or vacated on a proper application by him; but as no such application had been made, it appears to me that the order appealed from was regular, and authorized by the previous order under section 294 of the Code, and the proof that such last-mentioned order had been complied with.

If the order appealed from was useless or unnecessary, because the judgment against Ruckman and Beebe had already

been satisfied of record, I do not see how that order did, or could, injure either Ward or Williams.

I do not see how the order appealed from did, or could, take away or affect any right or remedy of Ward or Williams under the written agreement, on the execution of which, and the payment of $415.79 by Beebe, the judgment against Ruckman and Beebe had been satisfied of record, previous to the motion in which the order appealed from was made.

In my opinion, the order appealed from should be affirmed, with $10 costs.

INGRAHAM and LEONARD, JJ., concurred.

MOFFAT *a.* MOUNT.

New York Superior Court; General Term, May, 1863.

TRIAL BY JURY.—WITNESS.—HUSBAND AND WIFE.

In an action for an accounting in respect to both real and personal property, the transactions being alleged to be in the nature of a partnership, the practice of courts of equity does not confer on either party the absolute right to a trial by jury.

The right to a trial by jury in civil cases is waived by entering on the trial before the court without a jury without making objections.

Before the act of 1860, as well as since the amendment of 1862, husband and wife were not in general admissible as witnesses for and against each other.*

Appeal from a judgment.

This was an action between John Moffat and Richard E. Mount, Jr., executor of the will of W. B. Moffat, and Julia A. Moffat and others. The object of the action was to establish the existence of a partnership, and to have an accounting in respect thereto, the assets involving both real and personal property.

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* Compare Bihin *a.* Bihin, *infra*, 19.

P. G. Clarke and *Charles O'Conor*, for the appellants.

G. Tillotson and *James T. Brady*, for the respondents.

By the Court.—Robertson, J.—The only questions of law raised in this case are the refusal to grant a jury-trial, the exclusion of the plaintiff's wife as a witness, and the admission of Mr. Selden's account-books as evidence.

The practice of courts of equity in awarding issues in cases like this, does not confer on either party an absolute right to a trial by jury. Wherever a court of equity, from its less familiarity with discovering and weighing secret motives of action, and measuring men's ordinary conduct and conversation as the evidence thereof, felt the necessity of the aid of twelve men, taken from the mass of the community, and accustomed to scan nicely the conduct of mankind in their daily intercourse and multiplied transactions, it adopted, but did not accept, their assistance as a matter of absolute duty. It is true the court found that in a certain class of cases such assistance was beneficial, but I do not find any principle compelling a court to avail itself of such assistance. It was, therefore, in most cases, a matter of discretion, and not of right. But it is contended that before the adoption of the present Constitution in this State, the peculiar character of the claim would have entitled the plaintiff to a trial by jury, and, therefore, he was entitled to it here. I do not find in the case any objection made to the trial of the issues without a jury at the time of such trial. The plaintiff offered his testimony, and the cause proceeded without any objection or protest. The Constitution provides that a trial by jury may be waived in such manner as the Legislature may prescribe. (Art. 1, § 2.) The Code, in terms, only provides for a waiver by a failure to appear, filing a written consent, or oral consent in open court, entered on the minutes; but it has been settled that entering on a trial without objection is a waiver. (Greason *a.* Keteltas, 17 *N. Y.*, 491.) If the plaintiff felt confident that he was entitled to a jury-trial, he might have refused to appear; but, having taken the chance of a decision in his favor by a jury of one, he must abide by the consequences. If the plaintiff had confined himself to an action for an accounting as to personalty only, he might possibly have

been entitled to a trial by jury, as a substitute for the action of account; but he has gone upon the equity side for relief as to real estate, and, having joined the two, has deprived himself of the right of trial by jury. The very fact that he was entitled to different modes of trial as to the two different kinds of property, would probably have entitled him to split up his cause of action into two suits. (Greason *a.* Keteltas, *supra.*)

In regard to the admissibility of the plaintiff's wife as a witness, the Legislature of this State, in 1862 (*Sess. Laws of* 1862, 858, § 31), struck off the tag which had been fastened in 1860 to a previous amendment of section 399 of the Code (*Sess. Laws of* 1860, 787, § 12), and under which, attempts had been made to invade the sanctity of the domestic hearth, and introduce distrust by making husband and wife witnesses for and against each other. At the time of the trial in this case in 1857 there was no foundation for any such rule.

[The remainder of the opinion we omit, as it is concerned only with the peculiar facts of the case and the weight of testimony.]

LEE BANK *a.* SATTERLEE.

New York Superior Court; General Term, June, 1863.

Appeal.—Presumption in Support of Judgment.—Married Woman's Power to Indorse.

On appeal, the respondents are entitled to the benefit of any presumption which will uphold their judgment, in the absence of evidence, properly in the case, upon the point in question.

On appeal from a judgment in which the validity of a married woman's contract is involved, if it does not appear from the evidence, properly in the case, that she was the wife of the person with whom the contract was made, the appellate court will, in support of the judgment, presume that she was not his wife.

Where one draws a bill of exchange payable to his wife, her indorsement of the bill gives the indorsee a title which enables him to recover upon it against the acceptor. The validity of the indorsement does not depend upon a question of contract or obligation as between the husband and wife; but by his directing the bills to be paid to her order, she is made his agent to receive the money, and with the necessary authority to indorse and transfer the bill.

Appeal from a judgment.

The action was brought by the President, Directors, and Company of the Lee Bank, plaintiffs, against George B. Satterlee, defendant, upon three bills of exchange drawn by one Pierre C. Kane, at Lenox, in Massachusetts, upon the defendant George B. Satterlee, and accepted by him. These bills were drawn payable to the order of Mrs. Edith Kane, by her husband, and were accepted by Mr. Satterlee after being thus drawn. The bills were subsequently indorsed by Mr. Kane, and negotiated, and were afterwards discounted by the plaintiffs.

The allegations of the complaint were as follows:

I. That the plaintiffs are, and were at the times hereinafter mentioned, a corporation created by and under the laws of the State of Massachusetts, organized pursuant to an act of the Legislature of said State, entitled "An Act to establish the Lee Bank," approved March 27th, 1835, and the acts supplementary thereto, and renewal thereof, located and established at Lee, in said State of Massachusetts, and capable of suing and being sued in any court of record.

II. That on the 24th day of October, 1857, one Pierre C. Kane made his certain bill of exchange in writing, dated on that day, of which the following is in words and figures a copy, to wit: [*copy of bill payable* "to the order of Mrs. Edith Kane"].

III. That thereupon and subsequent to the making of said bill of exchange as aforesaid, the said Pierre C. Kane delivered it, for valuable consideration, to the said Mrs. Edith Kane; and that subsequent thereto, and before its maturity, the same was duly presented to the defendant George B. Satterlee, the person therein named, for acceptance, and the same was accepted by him in due form of law, by his writing across the face thereof, the words, "accepted. Geo. B. Satterlee."

IV. That subsequent thereto, and before the maturity of said bill of exchange, the same was duly indorsed by the said Mrs. Edith Kane to the plaintiffs herein, for valuable consideration, and that at the maturity thereof it was duly presented to the defendant for payment, and payment thereof demanded, but refused, and the same has not since been paid, nor any part

thereof, but the same is now wholly due and unpaid, although long past due.

Then followed similar allegations as to two other bills as second and third causes of action; and the complaint concluded by alleging that "the plaintiffs are now the lawful owners and holders of each and every one of said bills of exchange abovementioned, and that the defendant is now justly indebted to the plaintiffs thereon in the sum of," &c.

The answer traversed the incorporation of the plaintiffs, the delivery of the bills for value and the indorsement for value, and the plaintiffs' ownership and interest, and the non-payment of the bills, and averred that they were paid at maturity by a mortgage given by Mrs. Kane to the plaintiffs. It further averred that they were accepted by the defendant for the accommodation of Pierre C. Kane, or Edith Kane, and without consideration, of which the plaintiffs had notice. It further alleged, that when or after the bills became due, the plaintiffs and Pierre C. Kane made an agreement whereby the time for payment of said bills was extended to him without the consent of the defendant, and to his damage; and the defendant prayed that the plaintiffs be compelled to collect their claim against Pierre C. Kane and Edith Kane, on the bills, by the foreclosure of the mortgage, and that the bills as to defendant be cancelled, and his name be erased therefrom.

The new matter stated in the answer was denied by the plaintiffs' reply.

By a stipulation between the attorneys of the respective parties, the incorporation of the plaintiffs, the signature of Mrs. Kane, the indorser, and the fact that she was a married woman, were admitted.

The cause was tried on the 19th day of May, 1862, at special term, before Mr. Justice Barbour, without a jury. The signature of the bills which were offered in evidence by the plaintiff, was admitted by the defendant. The plaintiffs' counsel thereupon offered in evidence a mortgage dated 10th of November, 1857, purporting to have been made by Pierre C. Kane and Edith his wife, to the plaintiffs. The admission of said mortgage in evidence was objected to by the counsel for the defendant, and the court sustained the objection; to which plaintiffs' counsel duly excepted. Thereupon, with proof of the compu-

tation of interest, the plaintiffs rested their case. The counsel for the defendant, thereupon moved to dismiss the complaint, on the ground that the facts therein set forth did not constitute a cause of action against the defendant—that a married woman, by common law, has no right to indorse or transfer a bill of exchange, and that such indorsement gives no valid title thereto. The judge denied the motion; to which the defendant duly excepted. The counsel of the defendant, to sustain the issues in his behalf, offered in evidence a deed of trust, dated Sept. 26th, 1853, between Edith Kane Brevoort of the first part, Pierre C. Kane of the second part, and trustees of the third part, which was objected to by the plaintiffs' counsel, but the objection was overruled; to which plaintiffs' counsel duly excepted.

This trust deed being put in evidence, the defendant's counsel rested; whereupon the counsel for the plaintiffs renewed his offer to put in evidence the mortgage.

The judge received the same for consideration, but not then received it in evidence, subject to objection on the part of counsel for the defendant, who duly excepted thereto.

The case was afterwards submitted on written points; and after advisement, the judge gave judgment in favor of plaintiffs for the amount claimed, and interest with costs, and rendered the following opinion.

Barbour, J.—This action is brought by the indorser and holder, upon three bills of exchange, drawn in Massachusetts by Pierre C. Kane, upon the defendant, payable to the order of Edith Kane, the wife of the drawer, three, four, and six months after date, respectively, and indorsed by her, and duly accepted by the drawee before maturity.

The counsel for the defendant insists, that the drawing of a bill of exchange, and its delivery to the payee, constitute a contract between the drawer and drawee, whereby the former becomes bound to pay to the latter, or to his indorsees, the amount of such bill in case the same shall not be accepted, or paid upon due presentment; that a husband is incapable of thus contracting with his wife; that the wife, in this case, took no title by such delivery; and that the bills in question were and are, for these reasons, void, and inoperative as against the acceptor.

In the absence of all evidence of *mala fides possessio* in the

holder, proof of possession of the bills by the plaintiffs is, *prima facie*, sufficient to establish their ownership of them. (Conroy *a.* Warren, 3 *Johns. Cas.*, 259; Peacock *a.* Rhodes, *Doug.*, 363; Mottram *a.* Mills, 1 *Sandf.*, 37.) The plaintiff is therefore entitled to recover, if the bills are valid obligations as against the acceptor.

It is true that by the common law, which, in that regard, must control in this case, a husband and his wife are, in general, incapable of contracting with each other so as to create a right of action in favor of the one as against the other. But a bill of exchange is not merely a contract between the drawer and the payee. It is, when accepted, a new contract between the acceptor and the then holder, who in this case was the indorsee of the wife; nor is such a bill always a contract as between the drawer and the person to whom or to whose order it is payable. It may be made payable to the order of the drawer himself, or to some one receiving the same for collection for the benefit and the use of the drawer; or, what is a very common occurrence in commercial communities, it may be payable to the order of some person who indorses it simply for the accommodation of the maker. In none of those cases is there any contract which can be enforced by the payee named in the bill against the maker. In each instance, it is a mere direction to pay, and has no validity whatever as an obligation, until indorsed to a *bona-fide* purchaser or acceptor.

In this case the defendant held in his hands moneys belonging to the drawer to the amount mentioned in the bills. (Griffith *a.* Reed, 21 *Wend.*, 502.) He was directed by the drawer to pay those moneys over to his wife, or to such person as she should, by her order, appoint to receive the same; and by the same instruments, such drawer, in effect, constituted the wife his agent to receive the moneys, or by her order to appoint their payment to such other person as should become the holder of the bills, as he might well do. (*Co. Litt.*, 52, a.) Under authority thus conferred upon her, the wife indorsed the bills; the defendant duly accepted them; and the plaintiff is their *bona-fide* holder.

The obligation of the defendant to pay, rests not upon any supposable interest or want of interest in the wife as the payee named in the bills of exchange, but on his promise, implied in

the acceptance, to pay the amount out of the funds of the drawer, and which are now in his possession.

There must be a judgment for the plaintiffs for the amount claimed in the complaint, with costs.

The defendant's counsel excepted to the findings of law, and appealed to the general term of the court, from the judgment entered in favor of the plaintiffs.

Richard O'Gorman, for the appellant, urged that there was no evidence in the case that the married woman, Mrs. Kane, was the wife of the drawer, Mr. Kane, and no facts from which any presumption of the existence of an agency on her part, or consent upon his part could be founded; that the bills having been drawn and negotiated in Massachusetts, and no evidence being before the court as to the statute law of that State, the questions arising in this case must be examined by the light of the common law; and that under the common law a married woman could not take and convey title to property in a chose in action. (Barlow *a.* Bishop, 1 *East*, 432; 3 *Esp.*, 266.) That the cases which go to show that a married woman may indorse with consent of her husband, have no application to this case, for in all those cases there was direct evidence of such consent, as the court had valid grounds to presume that such consent existed, but there was here no evidence, direct or indirect, of the kind; and where a married woman, without her husband's authority or consent proved, indorses a note or bill, her act is a nullity, and her indorsement transfers no property in the bill or note. (Savage *a.* King, 17 *Maine*, 301.) There is another class of cases which support the proposition that the acceptor is estopped by his acceptance from pleading or offering evidence of the fact that the indorser was a married woman. In the present case, that fact being admitted by the plaintiffs, no objection being made to its introduction as evidence, no estoppel being urged, it was in the case, and it was now too late to say that defendant was estopped from alleging it. Moreover, the proposition is not correct that the acceptor of a bill of exchange does by his acceptance admit the capacity of the payee to indorse. The acceptor admits the signature of the drawer—no more. (Williams *a.* Drexel, 14 *Md.*, 566.)

F. C. Bliss, for the respondents.—I. The mortgage and also the trust deed prove that Mrs. Edith Kane, who indorsed these bills, had a separate property; and, if so, she would be personally liable in equity upon these bills indorsed by her. (*Bayles on Bills*, 4 Am. ed., 134, and cases there cited; Bulpin *a.* Clark, 17 *Ves.*, 366.) No personal claim, however, is made against Mrs. Kane, the action being against Mr. Satterlee, the acceptor alone, who stands in the same position as the maker of a promissory note. The acceptor of a bill of exchange is the principal debtor, while the drawer and indorsers are merely sureties. (Pearce *a.* Wilkins, 2 *N. Y.*, 469; Hall *a.* Newcomb, 3 *Hill*, 233; Atlantic Fire Ins. Co. *a.* Boies, 6 *Duer*, 583; Seabury *a.* Hungerford, 2 *Hill*, 80; Lee Bank *a.* Kitching, 11 *Abbotts' Pr.*, 435; *Am. Law Reg.*, 627, August, 1862.)

II. A wife may act as agent for her husband, and with his knowledge and consent may indorse bills or drafts, even in her own name for him, if he authorizes her so to do. (*Chitty on Cont.*, 3 ed., 161, *note*; Prince *a.* Brunette, 1 *Bing. N. C.*, 435; Priestwick *a.* Marshall, 5 *M. & P.*, 513; Coates *a.* Davis, 1 *Camb.*, 485; Miller *a.* Delamater, 12 *Wend.*, 433; Church *a.* Landers, 10 *Ib.*, 79; Gates *a.* Brower, 9 *N. Y.*, 205; 2 *Bright on Husb. & Wife*, 42. See, also, Case of Briggs, 1 *Taunt.*, 367.)

III. It is no defence to Mr. Satterlee, the defendant, that the payee or indorser of these bills was a married woman, for he is estopped, by his own act, of contesting her right or authority to indorse the same. Having accepted the bills as drawn by Mr. Kane, thereby agreeing to pay the sums therein specified to the order of Mrs. Edith Kane, he is estopped from saying that they were indorsed by a married woman, for by his acceptance he admits her right and authority to indorse them as the agent of her husband, or otherwise. (Smith *a.* Marsack, 6 *Com. Bench R.*, 486; Prince *a.* Brunette, 1 *Bing. N. C.*, 435; Priestwick *a.* Marshall, 7 *Bing. S. C.*, 565; Coates *a.* Davis, 1 *Camb.*, 485; Limestone *a.* Merrick, 5 *Mon.*, 25; Bank of Commonwealth *a.* Curry, 2 *Dana*, 142; *Byles on Bills*, 4 Am. ed., 250–256.) There are some cases and authorities analogous to the present case. (See Wotkins *a.* Abrahams, 14 *How. Pr.*, 191; Dorrance *a.* Scott, 3 *Whart.*, 309; 15 *Mass.*, 272; Borst *a.* Spellman, 4 *N. Y.*, 284; Philliskirk *a.* Pluckwell, 2 *Maule & S.*, 393.)

IV. The deed of trust, introduced in evidence, does not aid the defence herein, and is wholly irrelevant for the purposes of the defence.

By the Court.*—Monell, J.—The only question to be examined in this case is, whether the plaintiffs, through the indorsement of the payee of the bills, a married woman, acquired a title to them, which they can assert against the acceptor.

It nowhere appears who was the husband of Mrs. Edith Kane. The justice has not found the fact; nor is there any evidence which shows that she was the wife of Pierre C. Kane, the drawer of the bills. The plaintiffs are entitled to the benefit of any presumption which will uphold their judgment; and in the absence of all proof, we must presume she was not the wife of the drawer. The mortgage from Kane and wife to the plaintiffs, which is printed in the case, was not admitted or read in evidence, and we cannot therefore look into it for evidence on the subject.

Whether the payee of the bills was the wife of the drawer, or otherwise, is perhaps not material.

By the common law, a married woman was incapable of making any legal contract binding upon herself. Husband and wife were one person, and the legal existence of the wife was merged in that of her husband. Hence a married woman could not make, indorse, or accept notes or bills, as acting for herself; nor would the indorsee of a note or bill acquire any title through the indorsement of a married woman indorsing in her own name. (Barlow *a.* Bishop, 1 *East*, 432; Cotes *a.* Davis, 1 *Camp.*, 485; Savage *a.* King, 17 *Maine*, 301; 1 *Pars. on Notes & Bills*, 78.)

In Barlow *a.* Bishop, the defendant gave his note to a married woman, who was conducting business on her own account, and who transferred it by indorsement in her own name in payment of a debt contracted by herself; and it was held that the property in the note vested in her husband by the delivery to the wife, and that no interest passed by her indorsement in her own name to the holder.

If, therefore, Edith Kane was the wife of a person other than

* Present, Barbour and Monell, JJ.

the drawer of the bills, the property in the notes, by the common law, upon delivery to her became vested in her husband, which title could not be devested by her indorsement and transfer to the plaintiffs.

But the acts of 1848–9, for the protection of the property of married women, declare that she may take by grant or gift from any person other than her husband, and hold to her own sole and separate use, and convey any real or personal property, and any interest or estate therein, in the same manner and with like effect as if she were unmarried. (*Laws of* 1848, 307, ch. 200; *Laws of* 1849, 528, ch. 375.)

This statute removes the common-law disability from a married woman, and she can now receive real and personal property from any person other than her husband, and may convey and transfer the same with like effect as if she were single. (Dillaye *a.* Parks, 31 *Barb.*, 132.)

The delivery of the bills to Mrs. Kane vested the title in her, if they proceeded from a person other than her husband, and her indorsement and transfer gave to the plaintiffs the legal title as effectually, under the statutes referred to, as if she had been unmarried.

But suppose she was the wife of the drawer of the bills, how would the case then stand?

The question of contract or of obligation as between husband and wife is not involved; nor as between indorser and holder. The husband would not be liable to the wife, nor the wife to the holder.

By directing the bills to be paid to the order of his wife, the drawer appointed her his agent to receive the money, and conferred upon her the necessary authority to indorse and transfer. The authority is express, and sufficient to bind the husband by her act. (2 *Pars. on Bills & Notes*, 3; 2 *Kent Com.*, 179.)

In so far as third parties are concerned, the authority to the wife to transfer the bills is as conclusive and binding upon the husband as if he had made them payable to an infant, or to a fictitious person; in either of which cases the indorsements would be valid.

Did the indorsement of Mrs. Kane protect the acceptor, and could the payment by him be questioned? Clearly the husband was estopped, and no other party to the bill could object.

To test it, suppose the defendant had paid the bills at maturity to the holders, upon the indorsement of Mrs. Kane, could the husband deny the authority he had given his wife, recall his written consent, and recover the amount of the bills from the acceptor? There is neither principle nor authority to sustain such a position. In short, without pursuing the argument further, the husband is as thoroughly bound by the indorsement and transfer of the bills as if he had negotiated them himself directly to the Lee Bank. All the cases which hold a wife's indorsement to be void are such as contained no consent or recognition on the part of her husband. Here the consent is complete.

The judgment should be affirmed.

Judgment accordingly.

Contra 28 Hoir 22 4

GLENTWORTH *a.* MOUNT.

New York Superior Court; General Term, February, 1863.

Term-fees in Court of Appeals.

There is no limit to the number of term-fees taxable for terms in which a cause has been necessarily on the calendar of the Court of Appeals.

The provision of section 307, subdivision 7, of the Code of Procedure, as amended in 1858 and 1862,—by which term-fees are given "for every circuit or term, not exceeding five circuits and five special and five general terms,"—gives term-fees for every term during which a cause is necessarily on the calendar of the Court of Appeals, and is not heard, or is postponed by order of the court; but does not limit the term-fees in that court to five.

Appeal from an order allowing costs.

This cause having been on the calendar of the Court of Appeals for more than five terms, the clerk of the Superior Court, upon taxing the costs after the remittitur was sent down, allowed the successful party only five term-fees, from which decision an appeal was taken to the court, which, at special term, held that a fee was taxable for every term, and directed the costs to be adjusted accordingly.

An appeal was now taken to the court at general term.

Gouverneur Tillotson, for the appellant.

Ed. Randolph Robinson, for the respondent.

By the Court.*—Bosworth, Ch. J.—The words originally employed in the Code to describe the *fact*, which, as the general rule, entitles the prevailing party to a term-fee of $10, still form a part of the Code, and remain unchanged. Those words are: "every circuit or *term*," "at which the cause is necessarily on the calendar." (*Laws of* 1848, 545, ch. 379, § 262, subd. 6; *Laws of* 1849, 677, ch. 438, § 307, subd. 6; *Laws of* 1851, 104, App., § 307, subd. 8; *Laws of* 1852, 660, ch. 392, § 307, subd. 8; 2 *Laws of* 1857, 557, ch. 723, § 307, subd. 7; *Laws of* 1858, 493, ch. 306, § 307, subd. 7; *Laws of* 1862, 851, ch. 460, § 17.)

The words: "and is not tried, or is postponed by order of the court," prescribe the mode of ascertaining the number of terms for which the fee may be charged, and are a limitation upon the number of terms otherwise taxable. They exclude the term at which the cause is tried, and those at which it is reached, and is postponed by arrangement between the parties without any order of the court. The prevailing party cannot have the costs of a term at which the cause was reached, but instead of being tried was postponed at his request. The words: "not exceeding five circuits, and five special and five general terms," were not inserted to restrict the natural meaning of the words, "every circuit or *term*," but as a limitation upon the *number* of *circuits*, *special* terms, and *general* terms, which could be taxed.

If the design had been to prohibit the taxing of term-fees in the Court of Appeals, it would have been natural to conclude subdivision 7, of section 307, with the words, "but no term-fee in the Court of Appeals shall be allowed." Or instead of amending the section to read as it now does, to have altered it so as to allow "to either party, for every circuit not exceeding five, and five special and five general terms, at which the cause is necessarily on the calendar, and is not tried, or is postponed by order of the court, ten dollars."

* Present, Bosworth, Ch. J., Moncrief and Robertson, JJ.

But instead of doing either, the Legislature retained the words, originally employed to confer a right *to term-fees in the Court of Appeals*, as well as in the courts of original jurisdiction, unchanged; and used words, restricting the number of *special* terms, *general* terms, and *circuits*, for which term-fees might be allowed.

The act of 1857 (2 *Laws of* 1857, 557, § 307, subd. 7) allowed but three term-fees of a "term" of any kind to be taxed, and this applied as well to the Court of Appeals as to other courts. The words, "every term," includes the terms at which a cause is on the calendar in the Court of Appeals. (Slade *a.* Warren, 1 *N. Y.*, 431; Kanouse *a.* Martin, 2 *Sandf.*, 739; Webb *a.* Norton, 10 *How. Pr.*, 117; Reformed Dutch Church *a.* Brown, 24 *Ib.*, 89.)

The amendments of 1858 and 1862, which put this part of the Code in its existing form, should be regarded and construed like that of 1857, as imposing a limit upon the number of special and general term-fees to be taxed; but, unlike the latter statute, as imposing no limit upon the number of terms in the Court of Appeals. The amendment of 1858 *increased* the allowance from three special and three general terms and three circuits to five, and removed entirely the limitation upon the number of terms in the Court of Appeals.

The amendment to subdivision 6, of section 307, made in 1858, giving authority to the Court of Appeals, on affirming a judgment, "in its discretion, (to) award damages for the *delay*, not exceeding ten per cent. upon the amount of the judgment," is not opposed to the views above stated.

That amendment was made to enable the court to indemnify a respondent against the expenses caused by a vexatious appeal taken for the purpose of delay; and not to enable the court, as a substitute for term-fees, to make an equitable allowance in each case. That court would not award damages in any case, where it considered that the appeal presented questions of doubt or difficulty, and the appeal was brought in good faith. I think the order appealed from should be affirmed.

Order accordingly.

SHAW *a.* DWIGHT.

Supreme Court, First District; General Term, December, 1863.

Term-fees in Court of Appeals.

There is no limit to the number of term-fees taxable for terms in which a cause has been necessarily on the calendar of the Court of Appeals.

Appeal from an order disallowing term-fees on the adjustment of costs.

This action was by Daniel J. Shaw against Henry Dwight, Jr., and Ancel St. John. The plaintiff had judgment which had been affirmed with costs by the Court of Appeals. The cause was on the calendar of the Court of Appeals twelve terms, not reached or necessarily postponed. On appeal from the clerk's adjustment of costs, the plaintiff was allowed to tax only five term-fees: he appealed.

Benjamin C. Thayer, for the appellant.—I. Prior to the amendment of section 307 of the Code in 1859, plaintiff would have been entitled to twelve term-fees. The amendment applies only to circuits, special and general terms.

II. The terms of the Court of Appeals are neither special nor general terms.

III. Under the old system there were special and general terms, and the present system has retained these appellations. It would be as much a perversion of terms to apply these words to the Court of Appeals, as to call one of the terms of the latter a Court of Oyer and Terminer.

IV. These term-fees are given to the successful party as a *matter of right*, and no person's right can be taken away unless the intent be clearly expressed by the Legislature or by necessary intendment of law.

V. The limitation of term-fees, only applies to the circuit, special and general terms. (Adams *a.* Perkins, 25 *How. Pr.*, 368; Glentworth *a.* Mount, *Ante*, 15.)

Tracy, Powers & Tallmadge, for the respondents.

SUTHERLAND, P. J.—The question of costs presented by the appeal was recently carefully examined by Judge Bosworth, of the Superior Court, in Glentworth *a.* Mount, and he came to the conclusion, that since the amendment, in 1858, of section 307 of the Code, there has been and is no limitation to the number of term-fees in the Court of Appeals, taxable under subdivision 7 of that section. A copy of his opinion* having been handed to the court, I have examined it with care, and entirely agree with him. Judge Parker arrived at the same conclusion, in Adams *a.* Perkins (25 *How. Pr.*, 368). The order appealed from should be reversed, with $10 costs, and the clerk should be directed to readjust the costs, and allow the $120 for the twelve term-fees.

BARNARD, J., concurred.

LEONARD, J.—The opinion of the presiding judge is correct, I think, according to the legal construction of statutes; though the costs for term-fees in the Court of Appeals seem to have been lost sight of by the framers of the amendment.

BIHIN *a.* BIHIN.

Supreme Court, Second District; General Term, Oct., 1863.

TRIAL BEFORE REFEREE.—ADMISSION OF EVIDENCE.—RESERVING DECISION.—LIMITED DIVORCE.—STATUTE OF LIMITATIONS.—CRUEL AND INHUMAN TREATMENT.—TESTIMONY OF WIFE.—WITNESSES.—FORM OF OBJECTION TO EVIDENCE.

Where competent evidence has been received, subject to exception and to future decision as to its admissibility, an exception to this conditional admission becomes unavailable, in case the final decision is in favor of retaining the evidence.

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* Reported, *Ante*, 15.

Cruel and inhuman treatment, to justify a limited divorce, need not consist of injury to the person of the complainant.

Thus, a husband who, in presence of his wife, and in spite of her entreaties, unmercifully beats her child, inflicts an injury to her feelings, which is cruel and inhuman within the meaning of the statute.

What misconduct authorizes a limited divorce.*

The defendant in an action for a limited divorce, who offers to prove in his justification ill-conduct of the plaintiff, will be restricted to proof of what preceded, or was contemporaneous, with his own cruelty or misconduct.

Section 74 of the Code of Procedure,—which provides that the objection that an an action was not commenced within the time limited can only be taken by answer,—is applicable to actions for limited divorce.

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* In CONKLIN *a.* CONKLIN (at a special term of the Supreme Court, in the first district, in July preceding), it was *Held*, that demeanor calculated to provoke annoyance, discontent, and disgust, was not alone enough to authorize a judgment of separation, especially where such conduct was practised by both parties.

CLERKE, J.—Separations from bed and board forever, or for a limited time, are authorized by the laws of this State in cases, 1st, of cruel and inhuman treatment by the husband of his wife; 2d, such conduct on the part of the husband towards his wife as may render it unsafe and improper for her to cohabit with him; 3d, the abandonment of the wife by the husband, and his refusal or neglect to provide for her. It is also provided that the defendant in any such suit may be permitted to prove in his justification the ill-conduct of the complainant; and on establishing such defence to the satisfaction of the court, the bill shall be dismissed.

In the case before me, although I see very clearly if love, or even any considerable degree of ordinary affection, at any time influenced the intercourse of these parties towards each other, that it no longer exists, but rather distaste and estrangement; yet, on a careful consideration of the testimony, I do not deem myself authorized to grant the prayer of the complaint. I have no doubt that both have demeaned themselves, each towards the other, in a manner calculated to provoke mutual annoyance, discontent, and even disgust. This is one of those cases, too numerous, I fear, where affection no longer exists, and where the blessed spirit of patience and forbearance has deserted the unhappy pair, nothing remaining but unrest, dissatisfaction, and the total want of urbanity. But this does not authorize me to decree a separation between these parties. The law, whether wisely or unwisely it does not become me to say on this occasion, affords no relief in minor instances of matrimonial strife. It favors the indissolubility of the marriage contract, and no treatment can be a cause even for separation, except where the treatment is absolutely cruel and inhuman, or where it is such as to render it unsafe and improper for the wife to cohabit with the husband. I do not believe that the treatment of the defendant to the plaintiff was cruel and inhuman, or such as to render it unsafe or improper, though probably unpleasant, for her to cohabit with him. Besides, I cannot disregard the testimony of the son of the parties, who, though of tender age, is quite old enough to be conscious of the nature of an oath, and he positively swears that he saw his mother throw a glass tumbler at his father. Although she denied this on her examination, I think the boy's testimony is more reliable.

The complaint should be dismissed.

Thus, where the complaint in such an action averred acts of cruelty, committed more than ten years prior to the commencement of the action, with particulars of time, and the defence of the Statute of Limitations was not interposed in the answer,—*Held*, that evidence of such cruelty was admissible.

A referee appointed to hear and determine an action for limited divorce, has the same power which the court would have to provide in the judgment for the wife's maintenance.

Judgment is properly entered upon his report without confirmation.

Husband and wife cannot be witnesses on their own behalf for or against each other, except so far as, by the rule of court in respect to divorce cases, the restriction has been relaxed in favor of the wife, in cases of cruel treatment by the husband, in the absence of any other witness competent to testify.

Where a wife's testimony as to cruel and inhuman treatment by her husband is offered in an action for limited divorce, an objection that a third person was present is insufficient: it should also be suggested that the third person is competent to testify.

Appeal from a judgment of limited divorce, containing provisions for the wife's support.

This action was brought by Sarah Anna Bihin against John A. Joseph Bihin. The plaintiff and defendant intermarried in 1849, at the city of New York; were then inhabitants of the State, and were so at the commencement of this action. They proceeded the first year of their marriage to Europe, resided at Limburg, Belgium, and resided there three years. Returned to Philadelphia, Pennsylvania; afterwards resided in Queens county. The action was commenced in 1861. It was tried before a referee in the summer of 1862. The plaintiff gave evidence of various acts of alleged ill usage, both in Belgium and Pennsylvania, which were objected to as being out of the State, and many of them barred by the Statute of Limitations. The answer did not set up this statute. The referee admitted the evidence. The plaintiff was examined as a witness. The defendant's offer to be examined as a witness was rejected. There was evidence in the cause, from two witnesses besides plaintiff, of harsh and opprobrious language, and threats to commit violence; and of great infirmity of temper, which was the more terrifying from the fact that the defendant was seven feet eight inches in height. He had been exhibited in public as an object of curiosity, for years. The referee made his report in favor of plaintiff. Judgment was entered up without any application to the court, or confirmation of the referee's report.

The judgment adjudicated as well on the alleged real and personal estate of the plaintiff, as upon the question of divorce. The defendant excepted to the report, and appealed from the judgment, or decree.

F. H. B. Bryan, for the appellant.—I. The ruling of the referee, to reserve his decision as to the admissibility of certain evidence, was erroneous. (*Code*, § 272; Allen *a.* Way, 7 *Barb.*, 585; 10 *Johns.*, 128; 13 *Ib.*, 350; 16 *Ib.*, 89.) If the evidence was improperly admitted, it is error.

II. The referee erred in excluding the question as to the residence of the plaintiff, offered with a view to show her improper course of life and the object of her suit. (*Roscoe on Ev.*, 3 ed., 174, 175, 184; 4 *Esp.*, 242; Candell *a.* Pratt, *M. & M.*, 108; 1 *Barb. Ch.*, 318; 4 *Ib.*, 217.)

III. The Statute of Limitations may always be insisted on in equity, at the hearing, as matter of evidence. (3 *Bro. C. C.*; 2 *Cow. Notes to Ph. Ev.*, 351.) Even where no answer is interposed, the Statute of Limitations is a bar to the testimony. (Moulton *a.* Moulton, 2 *Barb. Ch.*, 309.) The objection to the question as to acts of defendant in Belgium, was well taken. The question embraced a series of acts out of the State, and barred by the Statute of Limitations. The objection to question as to acts of cruelty to Joseph, the son, should have been sustained. No such charge is made in the complaint, nor could the referee reserve his decision. The objection as to evidence of the separate estate of the plaintiff, with a view to found a judgment on it in this action, was properly taken.

IV. The plaintiff was, improperly, allowed to testify to acts occurring between her and her husband, at which a witness was present. This was a violation of the rule under which the referee admitted her to testify.

V. The referee erred in excluding the defendant, a party to the action, as a witness in his own behalf. Section 399 of the Code (prior to amendment of 1862), expressly provided for the examination of a party to the action. It designated that communications made between husband and wife shall not be required to be disclosed. This left the examination of either party open on all other subjects. (Chamberlain *a.* People, 23 *N. Y.*, 85; Marsh *a.* Patten, 30 *Barb.*, 508. Compare Brown

a. Richardson, 20 *N. Y.*, 472, as to mode of objecting to testimony of witness.)

VI. The decree in this cause was entered up without any application to the court, and under section 272 of the Code. 2 Rev. Stat., 147, § 54, provides for the decree being made by the court. Section 57 provides, that upon decreeing a separation, the court may make such further decree as the case may require. Decrees of divorce are to be made by the court. (1 *Barb. Ch.*, 610.) A report to found a decree on a decretal order must be confirmed. (*Ib.*, 550.)

VII. The decree adjudges defendant to deliver plaintiff possession of the farm in North Hempstead, and such personal property therein as belonged to her. This decree is erroneous. It pronounces on matters which were not, and could not be embraced in the issue. No evidence of the ownership of personal property by plaintiff was offered. These causes of action could not be united under section 167 of Code. The relief demanded in the complaint does not ask for possession of the estate.

Charles Edwards, for the respondent.—I. The plaintiff had a right to commence far back with acts of cruelty and continue them on, in order to show repeated and systematic misconduct. If we had stood upon old and insulated acts, the defendant could have set up the Statute of Limitations. He must do so, in order to raise a bar to such matter. (*Code*, §§ 74, 97.)

II. The answer admits marriage, inhabitancy, and birth of children, and then has only this: "And said defendant denies each and every other allegation, matter, and thing, in said complaint contained." There is no counter-charge of misconduct on the part of the wife; while the complaint has specific charges, satisfying thus the statute and decisions. (2 *Rev. Stat.*, 146, § 50; Hopper *a.* Hopper, 11 *Paige*, 46; Whispell *a.* Whispell, 4 *Barb.*, 217.) The defendant ought to have met each charge, for they present the matter in issue. (Codd *a.* Codd, 2 *Johns. Ch.*, 224; Germond *a.* Germond, 6 *Ib.*, 347.)

III. The soundest exposition of section 399 of the Code, will be that which keeps wife and husband, in divorce cases, from its provisions. The present is not such a case as will justify the

court in inequitably helping such a husband as we have here. See Chamberlain *a.* People (23 *N. Y.*, 85, 90),—but the point was really not passed upon by the court. The amendment to section 399 of the Code, made 1862, applies. It is true that the words of the amendment are sweeping: but it is respectfully insisted that this provision does not do away with disability arising from a peculiar position, as that of husband and wife, although it otherwise allows all persons not under such disability to be witnesses in their own actions. The incompetency as to a wife or husband, is an incompetency from other causes than being a party to the record. Before the last amendment neither wife nor husband could be a witness, under the Code, for or against each other. (Pillow *a.* Bushnell, 5 *Barb.*, 156; Erwin *a.* Smaller, 2 *Sandf.*, 340; Hasbrouck *a.* Vandervoort, 4 *Ib.*, 596; Smith *a.* Smith, 15 *How. Pr.*, 165.) In P. *a.* P. (24 *Ib.*, 197), the head-note is not sustained by the text.

IV. Here was evidence to sustain the judgment, aside from any thing the husband or wife could have said, and as the defendant had precluded himself, by his pleading, from showing any thing wrong on the part of the wife, what he might have had to state, could not possibly have countervailed the substantive evidence given by others. (Whispell *a.* Whispell, 4 *Barb.*, 217.)

V. It is proper to look at this case as though it were an application for a new trial. A new trial will be refused on a case, although the grounds taken at the trial were valid, if it is clear from other considerations, that the result would not be changed. (Horton *a.* Hendershot, 1 *Hill*, 118.) Where sufficient material facts appear to have been proven by other witnesses, the court will not grant a new trial on a case from the fact that an incompetent witness was permitted to testify. (Gardenier *a.* Tubbs, 21 *Wend.*, 169.) This case is an equitable one, and may be looked at as though testimony had been taken under a feigned issue. All that a court of equity requires is, to satisfy its conscience. (Bootle *a.* Bloomdell, 19 *Ves.*, 494; Woodworth *a.* Van Buskerk, 1 *Johns. Ch.*, 432; Dunham *a.* Winans, 2 *Paige*, 24; Hampson *a.* Hampson, 3 *Ves. & B.*, 41; Parker *a.* Ray, 2 *Russ.*, 63; Muloch *a.* Muloch, 1 *Edw.*, 14.)

VI. The defendant could have moved for a new trial at special term (*Code*, §§ 264, 265); he has, by his appeal, brought

before the general term the question of the merits as connected with the judgment.

By the Court.*—Scrugham, J.—The plaintiff is the wife of the defendant, and the action is brought by her to obtain a judgment of separation from bed and board forever on account of alleged cruel and inhuman treatment, and of such conduct towards her on the part of her husband as rendered it unsafe and improper for her to cohabit with him. In addition to the facts alleged in the complaint as constituting this cause of action, it is also alleged that the plaintiff, in the year 1854, purchased a farm and premises in Queens county, and the furniture in the house therein with her own money, and that such farm and furniture are her separate property, and in the prayer for relief she asks that proper provisions may be made in the judgment for her having sole possession of such household furniture, that all proper provision be made for allowance, present alimony and costs, and that she may have such further and other relief as may be proper.

On the trial before the referee a witness, produced by the plaintiff, was asked whether he had seen any thing harsh in the defendant's conduct towards his son Joseph, while his mother, the plaintiff was present. The question was objected to by defendant's counsel, and the referee overruled the objection, but stated that he would reserve his decision on the admissibility of the question, and directed the witness to answer, to which ruling and decision the counsel for the defendant excepted. If the referee had afterwards decided that the testimony which was elicited was inadmissible, it might be necessary to inquire whether he could properly hear it and reserve his decision upon its admissibility until his final decision of the cause. In all of the cases to which we are referred upon this question, testimony was received on the trial and afterwards rejected, and this was held to be error because impressions made by evidence which is improperly received may remain after it is stricken out, and may influence the final decision. If, however, the testimony is admissible and is retained, the declaration of the referee that he will reserve his decision upon its admissibility

* Present, Brown, Scrugham, and Lott, JJ.

until his decision of the case, cannot prejudice the party who objects to it, provided he is given the benefit of an exception to the overruling of his objection.

In this case an exception was taken to the ruling of the referee in receiving the testimony, and the important inquiry is as to its admissibility. It did not relate to any act of violence to the plaintiff's person, and it cannot be received if we are to construe the statute which declares cruel and inhuman treatment by the husband to the wife to be a cause for separation, to limit the evidence of such treatment to proof of the bodily injuries he may inflict upon her. But such a construction cannot be tolerated.

There are mental as well as physical sufferings, and as great cruelty and as much inhumanity may be manifested in producing the first as in causing the latter. They may be and often are produced by acts which cause no physical pain, and even by words alone. Accordingly, in cases like the present, such acts and words have been regarded as cruelties. Spitting on the wife is a gross act of cruelty (Clohen's Case, *Hetley*, 149; D'Argular *a.* D'Argular, 1 *Hagg. Ecc. R.*, 776); so also is a groundless and malicious charge against the wife's chastity (Durant *a.* Durant, 1 *Hagg. Ecc. R.*, 769; Lockwood *a.* Lockwood, 2 *Curteis Ecc. R.*, 281); and it surely cannot be denied that the savage who, in the presence of a mother, tortures or slays her helpless infant, is guilty of as great cruelty to the mother as to the child; so the husband who in the presence of his wife, and notwithstanding her remonstrances, prayers, and entreaties, unmercifully and cruelly beats her young child, outrages her maternal tenderness and sympathies, and commits a violence upon her feelings which is cruel and inhuman. The evidence in regard to the treatment of the boy Joseph, does not establish such a case as I have supposed, nor indeed does it very distinctly show that the punishment to which the defendant subjected him was more severe than that which, as a father, he might lawfully inflict. The question is not, however, upon the effect of the evidence, but as to its admissibility, and we are sustained by authority in holding it to be admissible. (Perry *a.* Perry, 1 *Barb. Ch.*, 516; and 2 *Ib.*, 311.)

The statute provides that the defendant in an action for separation or limited divorce, may prove in his justification the

ill conduct of the plaintiff, but this must be of such as preceded or was contemporaneous with that which seeks to justify, for no subsequent conduct of the defendant could furnish any reason, excuse, or justification for his precedent act, and therefore the question as to the residence of the plaintiff, after she left the defendant, proposed, as it is alleged, for the purpose of showing "an improper course of life," was irrelevant, and the ruling of the referee in sustaining the objection to it was correct.

The complaint, in stating the acts of cruelty upon which the plaintiff intended to rely as constituting her cause of action, gave the dates of their occurrence with sufficient particularity to inform the defendant that some of them happened more than ten years before the commencement of the action, and if he intended to object to proof of them on that account, he should have taken the objection by answer, for such is the positive requirements of the Code (§ 74); equally applicable to those actions which were formerly known as suits in equity, as to actions at law.

The statute which authorizes actions of this character, provides that "upon decreeing a separation in any such suit, the court may make such further decree as the nature and circumstances of the case may require, and may make such order and decree for the suitable support and maintenance of the wife and her children, or any of them, by the husband, or out of his property, as may appear just and proper." (2 *Rev. Stat.*, 147, § 54.)

To enable the court to exercise this power intelligently, the pecuniary circumstances of the parties must be inquired into, and the allegation in the complaint as to the separate property of the plaintiff, and the evidence in regard to it were pertinent to this inquiry. The order of reference sent the action and all the issues therein to the referee, to hear, try, and determine. The allegations of the complaint in regard to the plaintiff's separate property were denied by the answer, and the question thus presented was one of the issues which he was ordered to decide. My brethren, being a majority of the court, are of opinion that having made this decision, he was also authorized to determine the amount the defendant should be adjudged to pay for the suitable support and maintenance of his wife and children, and that it was not irregular to enter a judgment em-

bracing the further decree of this character authorized by the statute, without first applying to the court.

We have repeatedly held in this district, that the acts which allow parties to be witnesses in their own behalf, are not to be so construed as to permit husband and wife to be witnesses for or against each other.*

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* In some other districts of the Supreme Court than the first and second, and in the New York Common Pleas, a different rule has been followed.

In the case of AIKEN *a.* BAUMANN, Hon. Murray Hoffman (lately judge of the New York Superior Court), to whom the cause was referred, fully discussed this point, and *Held*, that according to the weight of authority in the Supreme Court of this State, husband and wife were competent as witnesses for or against each other; and that where one of them is admitted to testify, and says any thing which bears upon the case as sustaining the other, there can be no restriction on cross-examination which would not apply to any other witness.

He also *Held*, that in an action by a judgment-creditor to set aside as fraudulent a conveyance of the debtor's property, the debtor who is named in the summons and complaint as a defendant, and against whom relief, at least as to costs, is sought, is a party, within the provisions of section 399 of the Code of Procedure,—relating to the examination of parties.

The action was against Baumann, his wife, and others, It was brought by a judgment-creditor after execution returned, to set aside conveyances by which certain real estate was vested in the defendant, Mrs. Baumann, as made in fraud of creditors.

The defence of the wife was, in substance, that the real estate in question was not worth over $6,500, and the other property about $1,000; that she was worth, at the time of her marriage, about $7,000 in her own possession; that in the month of April, 1859, Baumann held the property subject to a mortgage for $1,800, to the Williamsburgh Insurance Company; and to another for $5,000, to T. Hoffstetter, and was indebted to Joseph Wangler in the sum of $1,000, which she had guarantied; that in April, 1859, she purchased the Hoffstetter mortgage, and paid the amount out of her separate property, and took an assignment; that at the same time, her husband conveyed the property to Wangler, and in payment of the $1,000 so guarantied, subject to the mortgages, being $6,800, and about $200 interest due, and Wangler sold and conveyed this property to her; that she paid him the $1,000; the $1,800 now remained a lien, and she now held the $5,000 mortgage. She denied all fraud, and averred possession by her.

William W. Peck, for the plaintiffs.

T. C. T. Bulkley, for the defendants.

HOFFMAN, Referee.—I agree with the counsel of the defendants, that the defendant Baumann is a party in the sense of the 399th section. He is named in the summons and complaint, and relief is sought at least for costs against him. (See Judge Ingraham's opinion in Macondray *a.* Wardle, 26 *Barb.*, 612.)

He was probably a necessary party. I agree with the counsel of the plaintiff, that if Baumann is a witness in the cause, and says a word which bears upon the case as sustaining the wife's defence, there can be no restriction on a cross-exam-

But by a rule of the court, especially provided for actions for separation or limited divorce, the plaintiff is allowed, in a reference, to take proof of the facts charged in the complaint, to be examined on oath as to any cruel or inhuman treatment

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ination which would not apply to any other witness. It would violate all just rules of evidence, if his testimony in her favor should be allowed, and any thing which could tend to impair or overthrow it should be excluded.

Hasbrouck *a.* Vandervoort (4 *Sandf.*, 597 ; and 9 *N. Y.*, 153) settled that where the action was by the trustee of a wife against a stranger, the husband could not be a witness for or against the trustee.

The points ruled were, that, at common law, the husband could not be a witness for the wife, nor the wife for the husband.

This was founded upon public policy, not the interest of the witness. And the Code had not changed this rule.

The rule then in force (1851) was, that no person offered as a witness should be excluded by reason of his interest in the event of the action, but the provision was not to apply to a party to the action. (*Code of* 1851, §§ 398, 399.)

The law was stated to be, that husbands and wives are not competent witnesses for or against each other in any suit in which either is a party, or in the event of which either has a distinct and certain interest.

The Code of 1857 repealed the exception in the previous Code as to parties or persons for whose benefit a suit was prosecuted or defended. It provided that a party to an action or special proceeding may be examined as a witness in his own behalf, the same as any other witness. Then followed an exception not necessary to be noticed. (1 *Laws of* 1857, 744, ch. 353.)

The amendments of 1858 and 1859 did not vary this provision.

On the 16th of April, 1860, the amendment of the 399th section went into effect.

It provided that a party to an action, &c., might be examined as a witness on his own behalf, or on behalf of any other party, in the same manner and subject to the same rules of examination, as any other witnesses; except, &c., "and except also that neither husband nor wife should be required to disclose any communication made by one to the other." (*Laws of* 1860, 787, ch. 459, § 12.)

And by the amendment of 1862, the Code of 1857 was, so far as respects the present question, restored. The words as to the husband or wife not being required to disclose communications, made by one to the other, being omitted.

The following are the leading authorities decided at different times since the Code of 1857 :

In Smith *a.* Smith (15 *How. Pr.*, 165, Special Term, Aug., 1857), the action was for a divorce, and, upon a reference, the wife was the only witness to prove the facts.

The Code was then the same substantially as it is now. It was held that the evidence was improperly allowed. The Code had not removed the common-law incompetency.

Macondray *a.* Wardle (26 *Barb.*, 612 ; S. C., 7 *Abbotts' Pr.*, 3) was a case very similar to the present, and the wife was held to be an incompetent witness. A person incompetent to testify, could not be made competent by being made a party.

alleged in the complaint, which took place when no witnesses were present who are competent to testify to the facts on such reference.

The plaintiff in these cases is generally the wife, and as her

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Andrews *a.* Nelson (7 *Abbotts' Pr.*, 3, *note*) was decided on the authority of this case, where a wife was sought to be examined upon supplementary proceedings against the husband.

Shoemaker *a.* McKee (19 *How. Pr.*, 86, General Term, 6th District, May, 1860) was an action to set aside a conveyance of a lot of land as fraudulent against creditors. It was against husband and wife, alleging that the money for the conveyance was paid by the husband.

The wife was held to be a competent witness. The decision is precise and directly in point, without any qualification.

The amendment of April, 1860, did not govern the question, although it was in force when the case was decided at General Term.

Babbott *a.* Thomas (31 *Barb.*, 277), a case cited, was determined upon points making it of little pertinence to the present question.

The case of Marsh *a.* Potter (30 *Barb.*, 506) was decided in January, 1860, at General Term of the Third District. It was of course under the Code of 1859, the same as that of 1857 in this respect.

The action was against husband and wife, for slander by the wife; and the rule was broadly stated, that, under the Code, husband and wife were competent witnesses on their own behalf, when co-plaintiffs or co-defendants; and were also competent witnesses for each other. One justice dissented.

The court admitted that in an action by a stranger against husband and wife alone, neither could be called against the other. It held also, that confidential communications between them were still protected from disclosure, as at common law. See also, to this point, Chamberlain *a.* People (23 *N. Y.*, 85, and cases cited).

Schaffner *a.* Reuter and others (37 *Barb.*, 44, May, 1862, 3d District) was an action very similar to the present. The consideration of a conveyance for a wife was proven by herself to have been money of her own, received by the husband in 1846, with a promise to repay it. Her evidence was admitted on the broad ground of the effect of the Code.

In Barton *a.* Gledhill (May, 1861, 12 *Abbotts' Pr.*, 246) the action was by Barton and wife against Gledhill and wife, for slander uttered by the wife of Gledhill.

The court below rejected the testimony of the plaintiffs. On appeal, this was held to be error, and the judgment was reversed.

The court placed its decision on the Code, irrespective of the act of April, 1860, as to the exception of confidential communications, although that exception is afterwards noticed as being decisive, if there was doubt without it.

In Johnson *a.* Johnson (Superior Court, General Term, 1861), a case of divorce, the court held that a wife or husband was not a competent witness to establish any material fact against the other in a suit between them.

The exception in the Code of 1860, relating to confidential communications, implies that the Legislature supposed the language before used authorized the admission of husband or wife as a witness. If the competency sprang from, or was contained in, the exception alone, the argument, from its subsequent omission, might be found irresistible.

But it was a qualification of what must be assumed to be previously allowed,

examination against her husband is not authorized except by the rule, her testimony can only be received when it relates to acts of cruelty of which there was no witness competent to testify on the reference. In this case, the plaintiff was allowed to give evidence of acts of violence alleged to have been committed upon her by her husband at Limburg, Belgium, in the presence of Mr. De Cass. Unless Mr. De Cass was competent to testify on the reference, this was proper, and the objection made to the testimony was not sufficiently explicit, as it did not allege his competency. Moreover, the principal facts which she stated occurred on that occasion, are proven by the evidence of Wm. H. Vyse.

The judgment should be affirmed with costs.

MACGREGOR *a.* BUELL.

Supreme Court, Third District; General Term, March, 1862.

APPEAL.—POWER OF COURT BELOW ON REMITTITUR.—COSTS.

Upon a remittitur from the Court of Appeals being filed in the court below, the latter court has no power to render any other judgment than one simply adopting that of the Court of Appeals as its own.

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and then the omission by no means negatives the competency. Perhaps it would be more logical to say that even such communications became admissible; or, the omission may be attributed to the fact that the general law would exclude evidence of that nature. The general rule, that confidential communications are not to be inquired into, I understand to mean, that a third party shall not be allowed to call for such disclosures.

Even after the dissolution of the marriage, as by death, what took place during it of that nature may not be inquired into.

But it cannot be that if a husband or wife is called, whose evidence benefits the other, a cross-examination can be restricted by any other rules than those which apply to other witnesses.

I do not think that the clause, "in the same manner and subject to the same rules of examination as other witnesses," affects, much less decides, this question. The clause was in the Code of 1860, which, as I have endeavored to show, did, by its very exception, import the general competency of husband or wife.

It strikes me that the weight of authority in the Supreme Court is decisive to establish the admissibility of the husband in this case.

Where, on an appeal from the decision of a surrogate, the decision is affirmed by the Supreme Court, and on appeal to the Court of Appeals both decisions are reversed "without costs," the appellant is not entitled to costs in either court.

Motion for judgment upon the remittitur of the Court of Appeals.

At a Surrogate's Court, held in and for the county of Saratoga on the 31st day of December, 1855, it was decreed by the surrogate that certain instruments offered for probate as the last will and testament of James Macgregor, deceased, be admitted to probate, and certain other instruments offered by James Buell be rejected. The decree also made other provisions, and ordered:

1st. That letters testamentary issue to James Macgregor.

2d. That there be allowed and paid to Duncan Macgregor, from the estate of the deceased, his costs for witness-fees to be taxed.

3d. That there be allowed and paid to Duncan Macgregor and James Buell, from the estate of said deceased, the amount of money they have respectively paid and become liable to pay to the surrogate for his fees, in the matter of the proceeding to prove said will.

Duncan Macgregor appealed from the latter portion of said decree to the general term of the Supreme Court. The notice of appeal asks that these provisions be reversed and stricken out, and that in lieu thereof, an order be made that James Buell pay to Duncan Macgregor his taxable costs for attorney and counsel, witnesses and surrogate's fees, and disbursements in said proceeding.

At a general term of the Supreme Court, held at Ballston Spa, on the second Tuesday of July, 1857, an order was made affirming the decree of the surrogate with costs of the appeal, without prejudice to the right of Duncan Macgregor to apply for letters testamentary upon said last will, and to answer the objections filed against him before the surrogate.

The appellant appealed from this order to the Court of Appeals, and on the tenth day of October, 1861, the Court of Appeals made an order, by which they did "order and adjudge that the judgment of the Supreme Court appealed from in this action be reversed, annulled, and altogether held for nothing.

And it was further ordered and adjudged, that said reversal be, and the same hereby is, without costs and without prejudice to any future application for letters testamentary."

The appellant now moves upon the remittitur of the Court of Appeals for judgment in pursuance of the decision of that court, and asks for such judgment as the general term ought to have given in case that court had reversed the decision of the surrogate, including costs of the appeal to the Supreme Court.

J. Ellsworth, for appellant.

W. A. Beach, for respondents.

Miller, J.—The Code (§ 12) provides that "the Court of Appeals may reverse, affirm, or modify the judgment, or order appealed from, in whole or in part, and as to any or all the parties, and its judgment shall be remitted to the court below to be enforced according to law." It is claimed by the counsel for the appellant that the reversal of the judgment of affirmance as to the issuing of letters testamentary to James Macgregor, in which James Buell had no interest, and of the judgment of affirmance as to costs, of necessity operates as a reversal of the surrogate's decree, and sustains the appeal as to James Macgregor and James Buell; hence, that the appellant is entitled to costs on both of these appeals. It is also claimed that in reference to the costs incurred upon Buell's citation, issued for the purpose of proving a will which was finally rejected by the surrogate, the reversal of that part of the surrogate's decree disposing of the costs, leaves to this court the duty of disposing of that question, and that the Court of Appeals has no power to regulate the discretion of the surrogate. The Revised Statutes, in reference to the hearing of appeals from the surrogate's decision to the Supreme Court (2 *Rev. Stat.*, 608, § 95), provides that "at the time and place appointed, and at such other times as the matter shall be adjourned to, the Supreme Court shall proceed to hear the allegations of the parties, upon the proofs submitted by them to the surrogate, and shall affirm or reverse the decision of the surrogate, as shall be just." Section 96, "If the decision be affirmed, the Supreme Court shall award costs, to be paid by the party appealing, either personally or out of the estate of the deceased, as he shall direct. If the decision

be reversed upon a question of law, costs shall in like manner be awarded against the party maintaining the decision of the surrogate, either personally or out of the estate of the deceased." Section 97, "Such affirmance or reversal upon a question of law shall be certified to the surrogate whose decision was appealed from by the Supreme Court, with the award of costs made by him, and the copies of papers sent to such judge shall be by [it] returned to the surrogate," &c.

The general term affirmed the decision of the surrogate, with costs of the appeal.

Upon appeal, the Court of Appeals reversed the decision of the general term. This reversal is without costs, and the question arises within them—is any power in the general term, upon this application, to make any other order than a formal one to carry into and enforce the decision of the Court of Appeals?

1. It seems to me that the provisions of the statute above cited, have reference only to the hearing before the general term upon the appeal from the surrogate's decision. Section 95 provides especially for such a hearing, and sections 96 and 97 for a disposition of the matter upon the decision being made. There is nothing in either of these sections which authorizes any action of the court after an appeal to the Court of Appeals. There are no allegations of the parties to be heard, or upon which the general term is authorized to take any action. Nor is there any power to render any judgment, except to enforce according to law, under the provision of the Code above cited, what the Court of Appeals has done.

2. The Court of Appeals disposed of the whole matter before them. They decided to reverse the decision of the Supreme Court, and that the reversal should be without costs. They had full power and authority to make provision for the costs upon the appeal—at least to the general term, if not for those before the surrogate. As all the questions involved in the appeal were before them for adjudication, it is to be presumed that they purposely made their decision in the form that it now is, so that neither party recover costs as against the other.

3. Upon the application for judgment upon a remittitur, after an appeal has been decided by the Court of Appeals, the party in whose favor the judgment is given applies to the court from which the appeal was taken for an order that the decision

or judgment of the court above shall be and become the decision and judgment of the court below; and the only power vested in the inferior tribunal, is to adjudge that the judgment of the Court of Appeals be enforced as provided by the Code. Beyond this there is no jurisdiction to act.

I am of the opinion, therefore, that the proper disposition of this motion is to grant an order to enforce the judgment of the Court of Appeals, and to make said judgment the judgment of this court, and that the residue of the motion in this cause be denied, without costs and without prejudice to such further proceedings (except a renewal of this motion) as the moving party may be advised to take in this court, or in the surrogate's court, to enforce the judgment of the Court of Appeals, or to obtain the benefit thereof.

MACOMBER *a.* THE MAYOR, &c., OF NEW YORK.

N. Y. Superior Court; At Chambers, Feb., 1860.

City of New York.—Judgment by Fraud or Collusion.—Constitutional Law.—Judgment-roll.—Proof of Service.—Voluntary Appearance.—Jeofails.—Irregularity.—Amendment.—Entry of Judgment.—Excusing Default.

No court has a right to declare a legislative act unconstitutional unless it is glaringly so.

This rule applies with peculiar force to the action of a single judge on a collateral motion.

It seems, that the fifth section of Laws of 1859, 1127, ch. 489,—allowing the comptroller of the city of New York to take measures, in the name of the city, to reverse or modify judgments against the latter, which he has reason to believe were obtained by collusion or fraud,—is not unconstitutional.

The employment of attorneys other than the corporation counsel to represent the city of New York is valid.

The consent of the corporation counsel to the employment of other attorneys, by the city of New York, gives them, when so employed, full power to represent the city as such attorneys.

Section 5 of Laws of 1859, ch. 489,—which authorizes the comptroller to move to open judgments against the city,—renders the belief of the comptroller sufficient ground for his intervention. Such belief existing, he is entitled to pros-

ecute any mode of relief which might be claimed by the city; and this even though fraud and collusion are denied or disproved.

Under section 174 of the Code of Procedure,—which provides for relief in cases of mistake,—the court have power, at any time within one year, to relieve against a judgment suffered by mistake, surprise, inadvertence, or excusable neglect.*

A judgment-roll, on failure to answer, must contain proof of due and timely service of the summons.

A voluntary appearance in an action gives jurisdiction, and cures defects in previous process, but will not justify a judgment on failure to answer without proof of the actual service of the summons.

The provisions of 2 Rev. Stat., 425, § 9, that no process, pleading, or record be impaired without the order of court, is still in force.

Irregularities and omissions may be amended by leave of the court in the cases

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* In Borsdorff *a.* Dayton (*Supreme Court, First District; At Chambers, February,* 1863), it was *Held,* that where the defendant dies before the expiration of his time to answer, the court has no power to enter judgment against him. And a judgment so entered will be set aside on motion, even after the expiration of a year from the date of entry.

The cause came up on motion to vacate the judgment.

The action was brought by Charles E. Borsdorff against Charles W. Dayton. The defendant was served with the summons, January 18th, 1861; he died on the 20th January Samuel Lord qualified as his executor on the 4th of February, 1861. Plaintiff entered judgment, without revivor or notice to the executor. The executor was served with notice of plaintiff's claim under the judgment in September, 1862. He now moved to vacate the judgment as irregular.

William R. Stafford, for the motion, cited 2 *Rev. Stat.*, 607, § 8; *Ib.*, 277, § 57; *Ib.*, 690, §§ 8, 9; and *Code,* § 121.

Levi S. Chatfield, in opposition, insisted that the motion should have been made within one year after entry of the judgment. (2 *Rev. Stat.*, 606, § 3.)

Barnard, J.—I think there was a want of power in the court to enter judgment. By statute, defendant had 20 days within which to defend. Long before the expiration of that time he died. At the time of his death, he was not in default, and the plaintiff had no right to a judgment. I cannot concede that a default can be taken against a dead man, any more than that a summons can be served on a dead body.

Motion granted.

In Jay *a.* De Groot (*Supreme Court, First District; At Chambers,* 1858), after judgment for plaintiff on failure to answer in an action brought by the receiver of a corporation against a debtor to the corporation, the defendant moved to open the judgment, among other grounds, to enable him to set up as a defence that the plaintiff was not legally appointed receiver.

Held, that, as the plaintiff was acting under an order of the court acquiesced in by the company of whose assets he was appointed receiver, the defendant, a debtor to the company, could not object to the irregularities, if there was in the original proceedings enough to give the court jurisdiction.

enumerated in 2 Rev. Stat., 424, 425, § 7, where an amendment is not against the right and justice of the matter in suit.

The statute of jeofails was first made applicable to judgments by default (4 & 5 *Anne*, ch. 16, § 2), and a marked distinction exists between judgments after trial and judgments by default,—unfavorable to amendments in the latter, whether the defect is suggested by the plaintiff or defendant.

Leave to plead or answer after default should not be granted, unless the party has a good defence on the merits, and the omission to plead or answer was the result of accident or mistake, without culpable negligence.

Although, under section 311 of the Code of Procedure,—which provides for insertion of costs in judgments,—the judgment be entered before the adjustment of costs, failure to comply with this rule is not sufficient to justify setting aside a judgment otherwise regular.

Although relief against irregularities cannot be obtained on a notice of motion not specifying the defects, yet in proper cases the motion should be denied without prejudice to its renewal.

In an application by the comptroller of New York to set aside a judgment by default against that city, entered upon a voluntary appearance without proof of timely service of the summons, the merits of the action being doubtful,—*Held*, that the want of proof of service of summons entitled the defendant to have the judgment vacated, and that defendants should be allowed to plead or answer without terms.

Motion to vacate judgment, and for leave to answer.

This action was brought by Sanford L. Macomber against The Mayor, Aldermen, and Commonalty of the city of New York, to recover $538, the compensation due plaintiff as assistant keeper of one of the corporation yards. The facts are fully stated in the opinion. The motion was made by Robert T. Haws, comptroller. The motion was heard upon an order to show cause "why the judgment entered in this action should not be vacated, and why the defendants should not be permitted to file an answer to the complaint, and why the issues to be joined in said action should not be tried by a jury, or for such other or further order or relief as to the court may seem meet."

Tracy, Powers & Tallmadge, for the motion.

Sanford L. Macomber, opposed.

Hoffman, J.—This is a motion on behalf of the comptroller of New York to open a judgment obtained by the plaintiff against the defendants, on the 16th of December, 1859, for the sum of $554.57.

On the 15th of November, 1859, the summons and complaint were served upon Daniel F. Tieman, then mayor of the city, by leaving copies of the same at his office, in the City Hall, with Mr. Auld his clerk, the mayor being temporarily absent. The receipt of the same, it is stated on information and belief, was noted in a book kept in the office. The copy served has been seen in the office of the present counsel to the corporation, indorsed, "Rec'd Nov. 15, 1859, D. F. T.," in the handwriting of Mr. Tieman, as is believed by the deponent. A notice of appearance on behalf of the defendants was received by the attorney of the plaintiff, from Richard Busteed, Esq., late corporation counsel, signed as the attorney of the defendants, dated the 16th of November, 1859.

The summons demanded the sum of $538, with interest from its date. The prayer for judgment in the complaint was for the same.

On the 7th of December, 1859, a notice to the following effect was drawn and signed by the plaintiff's attorney, and served upon Mr. Busteed on the 8th of that month: "that the amount claimed, and the interest, and the costs and disbursements, as above stated, would be ascertained and adjusted by the clerk, at his office in the City Hall, on the 13th of December." A statement of the amount claimed, of the interest, and the costs accompanied this notice.

On the 13th of December, 1859, an affidavit was made by the plaintiff's attorney, that no answer, demurrer, or notice of appearance had been received in pursuance of the requirement of the summons, and as to the disbursements having been necessarily made or incurred. This was subjoined to a statement for judgment of the amount, interest, and costs, being together $554.57. Then followed the judgment in this language: "Judgment, December 13, 1859. The summons in this action having been personally served on the defendants, on the sixteenth day of *December*, 1859, and no answer or demurrer to the complaint having been received by the plaintiff's attorney, as required by the summons;—Now, on motion of Daniel H. Stone, plaintiff's attorney, it is hereby adjudged that Sandford L. Macomber, the plaintiff, recover of the mayor, aldermen, and commonalty of the city of New York, the defendants, the sum of five hundred and forty-one dollars and fourteen cents, the

amount claimed with interest, with thirteen dollars and fifty-seven cents costs and disbursements, amounting in the whole to the sum of five hundred and fifty-four dollars and fifty-seven cents. Filed, Dec. 13, 1859. Geo. T. Maxwell, clerk."

The judgment-roll consists of the summons; the complaint, with its verification; the notice of appearance from Mr. Busteed; the statement and notice for ascertaining and adjusting the amount, served the 8th of December, for the 13th of that month; the affidavit of service of that statement and notice upon Mr. Busteed; the statement for judgment, affidavit of no answer, or demurrer, *or notice of appearance* having been received, and the judgment in the form above stated.

The comptroller of the city now applies to vacate the judgment, or to have its execution suspended, and the defendants permitted to defend the action. His application, sworn to on the 5th of January, 1860, is made under the 5th section of the act entitled, "An Act to enable the Supervisors of the City and County of New York to raise money by tax." That section provides (*Laws of* 1859, 1127, ch. 489) that "whenever the comptroller of the said city (New York) shall have reason to believe that any judgments now of record against the mayor, aldermen, and commonalty of the city of New York, or which may hereafter be obtained against them, shall have been obtained by collusion, or founded in fraud, he is hereby authorized and required to take all proper and necessary means to open and reverse the same, and to use the name of the said mayor, aldermen, and commonalty, and to employ counsel for such purpose."

1. With respect to the question raised as to the constitutionality of the fifth section now proceeded under, it is sufficient to observe, that no court has a right to declare a legislative act unconstitutional, unless it is glaringly so; that a judge at special term, upon a collateral motion in a cause, would evince great temerity who should attempt it; that it may at least be well doubted whether this provision is a local or private bill within the 16th section of article 3 of the Constitution of 1846 (5 *N. Y.*, 285; 16 *Ib.*, 58); and that the power of the Legislature to alter the charters of public corporations without their consent, provided rights of property are not affected, cannot be doubted, unless, as is shown in the same opinion, and con-

firmed by the Court of Errors, a constitutional restriction has not been observed in making such alteration. (People *a.* Purdy, 2 *Hill*, 31; 4 *Ib.*, 385, per BRONSON, J.)

2. If there is repugnancy between the devolution of the power to represent the Corporation to the comptroller in this section, and the provision of the charter (§ 26) vesting the charge of all the law business of the Corporation in the law department, either the charter is in this particular legally modified by the act, or the written consent of the present counsel obviates the objection. This court has held, at general term, that the corporation counsel may employ other counsel, and authorize attorneys to appear and represent the interests of the city. That has been done in substance here. (Mayor, &c. *a.* Exchange Fire Ins. Co., at Special Term, 9 *Abbotts' Pr.*, 380; S. C., 17 *How. Pr.*, 380; at General Term, *MS.*, July, 1859.)

3. If I construed the fifth section as the plaintiff insists it must be, in the manner urged very fully in the second point of Mr. Field, in Sharp *a.* Mayor, &c.,—that the comptroller must establish fraud or collusion, or his application must fail,—I should be greatly embarrassed. I should doubt whether a step could be taken by the court, on the naked allegation of the officer of his belief that collusion or fraud existed; and that doubt would be increased, when such belief is met by the explicit denial of either the plaintiff or his attorney.

But I do not so understand the enactment in question. I consider that it was intended to operate, and does operate, to confer upon another of the city officers the authority ordinarily resting in the officer of the law department—to interpose in an action, though after judgment; and, under certain conditions, to take every legal step in relation to the judgment which would be taken by the ordinary officer, the attorney, or counsel on the record, or by the client, the Corporation itself. This must be done, under and subject to the law and the rules, which apply to similar applications in the usual course of an action between individuals; and as a necessary consequence from these views, the comptroller may place himself before the court precisely upon the grounds which an individual suitor may take, when he comes to open a judgment under the 174th section of the Code.

In this view, the clause of the enactment requiring an affi-

davit of belief as to fraud or collusion, is restrictive of the power of the new officer. He may not interfere, except a case is made out to him warranting a presumptive conclusion of the fraud. The law then gives faith to his public and official station, so as to render his belief sufficient ground for his intervention; but that places him only, yet it does place him fully, in the position of an ordinary party seeking to open a judgment. His action will not then be what the Scotch law calls a vicious intromission in a suit; but when he fulfils the statutory condition of interfering at all, he is to pursue, and is entitled to take, all the legal measures and means open to others.

The 174th section of the Code gives discretionary power to the court, at any time within one year after notice of a judgment, and upon such terms as may be just, to relieve a party from it, when it has been taken against him through his mistake, inadvertence, surprise, or excusable neglect. Besides this, the general right to vacate a judgment for the irregularity of the party obtaining it, is undoubted. (8 *How. Pr.*, 312; 2 *Rev. Stat.*, 359, § 2; *Code*, §§ 468, 469; 2 *Sandf.*, 641.)

There are some irregularities in the judgment and judgment-roll produced.

It states the judgment as of the 13th of December, 1859, upon service of a summons personally on the 16th of *December*, 1859. The affidavits show service on the 15th of *November*, 1859. The appearance on the 16th of November is in the roll.

But what is of more importance, there is nothing in the roll showing personal service of summons or complaint at all.

By section 216 of the Code, judgment may be had, if the defendant fail to answer, as follows: In an action for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint, and that no answer has been received. The clerk shall thereupon enter judgment, &c.

By section 281, unless the party or his attorney shall furnish a judgment-roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers, which shall constitute the judgment-roll: In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, *proof of service*, and that no answer has been received, the report, if any, and a copy of the judgment.

The 282d section provides that on filing the judgment-roll upon a judgment, directing, in whole or in part, the payment of money, it may be docketed with the clerk of the county where it is rendered, and in any other county, &c.; and then, by section 287, when the execution is against the property of the judgment-debtor, it may be issued to the sheriff of any county where the judgment is docketed.

Thus it seems clear, that a judgment-roll must be perfected as prescribed, then the judgment be docketed, and the execution against property can only issue upon a docketed judgment. If the roll does not contain proof of service of summons and complaint, or of summons in one case, the docket and the execution would seem to be irregular at least.

I am not prepared to say, that the recital in the judgment, altered by the clerk, of the summons having been personally served on the defendants, may not raise a presumption of the fact, so as to sustain the judgment proper. But the serious difficulty as to the judgment-roll and the execution remains. There would be ground to set aside the execution; and then the court must be applied to for an amendment of the roll, assuming that the proof of service of summons and complaint was actually filed under section 246, and showed service on the 15th November. The provision of the Revised Statutes (2 *Rev. Stat.*, 425, § 9), that no process, pleading, or record shall be amended or impaired by the clerk or other officer of any court, or by any other person, without the order of such court, or of some other court of competent authority, is, I apprehend, in full force. The plaintiff would then be driven to an application.

That the plaintiff would have relief from these irregularities upon such an application, cannot be doubted. Section 176 of the Code seems intended to cover the enumeration in the Revised Statutes (2 *Rev. Stat.*, 424, § 7) of all the imperfections and omissions, which were provided for in the old statutes of jeofails. (See *Bing. on Judg.*, 74–78; *Law Lib.*, 13, 31.)

Without entering into the learning as to when misprisions and omissions could be disregarded, and when recourse to the court to correct them was necessary, it is sufficient to observe that, by section 8 of the Revised Statutes (2 *Rev. Stat.*, 425), the omissions, imperfections, defects, and variances in the 7th section enumerated, shall be supplied and amended by the court.

An application to the court then was indispensable in those cases, and subdivision 13 of section 7 is precisely the case before me.

But in section 8, the important clause is inserted, that the omissions, &c., and all others of a like nature, are not to be "against the right and justice of the matter in the suit;" and in the Code (§ 176), those are to be disregarded which do not affect the substantial rights of the adverse party.

I think I am justified in saying, that in applications of this character to the court, the merits of the case,—the fact whether the plaintiff, who seeks assistance, shows a clear or a doubtful case, may not be wholly disregarded even when a trial has been actually had; and that where there has been a default, and an application is then made for the interference of the court, the plaintiff subjects himself to an inquiry into the nature and justice of his claim. It deserves notice on this point, that it was not until 4 and 5 *Anne*, ch. 16, § 2, that the statute of jeofails was made applicable to judgments by default at all. (*Bing. on Judg.*, 77.)

And through all the cases on this subject, a marked distinction is traceable between judgments had after trial and judgments by default; and this, whether the plaintiff applies to remedy a defect in his judgment, or the process which led to it, or the defendant applies to open and set it aside. Nay more, it is the every-day practice to open a regular default, upon terms more or less stringent; and so it has long been. (*Bing. on Judg.*, 22.)

In Levy *a.* Joyce (1 *Bosw.*, 622), through an excusable omission, and under very special circumstances, a claimant upon a fund who had omitted to produce his proofs at a regular trial, where he had the opportunity to do so, was allowed to come in. The establishment of his claim might have impaired the priorities of other parties upon the fund in suit.

In Bell *a.* Kelly (2 *Harr. N. J.*, 270) there was a judgment by default, and some proceedings taken to amerce the sheriff. There was then an application to open the judgment, on an affidavit that the defendant had been an indorser on several notes, and supposed the one sued upon was genuine, which he had now reason to believe was forged.

Mr. Justice Bronson, in Fort *a.* Bard (1 *N. Y.*, 43), in which

it was decided that an order opening or refusing to open a judgment regularly obtained was not appealable, states the rule thus: When the time (to appear and defend) has expired, and his default has been entered, the legal right is at an end; and if he wishes to be heard, he must ask it as matter of grace and favor. The motion for leave to plead or answer, is addressed to the discretion of the court, and may be granted or refused, as the ends of justice may require. "It should not be granted unless the party has a good defence on the merits, and the omission to plead or answer in due time was the result of accident or mistake, without any culpable negligence on his part." (See, also, Fake *a.* Edgerton, 6 *Duer*, 653.)

Another question to be considered is, whether the defect is of such a character as to render void, or in any way affect the judgment or execution, or both.

There are several cases which bear upon this point, which should be noticed.

In Renouil *a.* Harris (2 *Sandf.*, 641), it was held that the omission of the clerk to attach the answer to the roll was not enough to vitiate a judgment and execution. It was not the plaintiff's fault. The roll was not a nullity, and could be sustained by directing the original answer, or a copy, to be attached as of the date when the roll was filed. A copy was, in fact, attached before the motion was brought in. (Clute *a.* Clute, 4 *Den.*, 241, is cited.)

In Cook *a.* Dickerson (1 *Duer*, 679), the clerk had omitted to attach to the roll the verdict or copy of the minutes taken at the trial. He filed the roll without doing this, but subsequently inserted it. It was held, on a motion to set aside the judgment and execution, that section 176 applied, and Renouil *a.* Harris (*supra*) and Clute *a.* Clute (*supra*) were relied upon.

In each of these cases, the fault was that of the clerk. In the present, the plaintiff's attorney had the proof of service, and was the party to furnish it. It is not shown, even upon the affidavits, that such proof was ever filed with the clerk.

But Clute *a.* Clute appears to me to hold this: "Until the record of a judgment was filed," under the old system, "an execution issued thereon was not only irregular, but, as was observed by Chief-justice Savage, it is a mere nullity." (5 *Wend.*, 109.) But on filing the record it ceases to be a nulli-

ty, and *thenceforth* it becomes effective against the defendant therein.

In Butler *a.* Lewis C. P. (10 *Wend.*, 541), the subject under the provision of the Revised Statutes,—declaring that no judgment shall be deemed valid, so as to authorize proceedings thereon, until the record shall have been signed and filed,—was carefully examined, and the cases where amendment or entry or filing, *nunc pro tunc*, had been permitted, were discussed. The court says: "To allow an amendment in this case *nunc pro tunc*, so as to save the lien of the judgment when docketed, a priority of executing, would be overlooking all the provisions of the Revised Statutes, and establishing a precedent that must sustain every judgment, when a paper in the form of a record has been filed by the attorney and docketed, disregarding every injunction of the statute."

In the American Exchange Bank *a.* Smith (6 *Abbotts' Pr.*, 1), it was held, that where judgment was entered upon failure of the defendant to answer, it was not essential to the regularity of the judgment that the roll should show on its face that the note which was sued upon was produced to the clerk, and that he assessed the amount due thereon. The Code did not require that this should appear by the record itself.

In Townshend *a.* Wesson (4 *Duer*, 342), the subject was fully discussed. The question arose upon a title made by a sheriff's deed, and that involved the sufficiency of the judgment and its docket. The absolute necessity of a judgment-roll constituted as the Code prescribes, to render a docket proper, and to bind lands, and the illegality of an execution issued without such a docket, is plainly and fully declared. And the provision of the Revised Statutes before cited, as to the necessity of filing a record of judgment to render valid any proceedings, is considered not to be repealed by the Code, or at least the previous rule recognized by the statute.

Duer, J., observes that the Code, however, seems to dispense with any signing of the roll.

In Thomas *a.* Tanner (14 *How. Pr.*, 426), Justice Harris speaks of the roll containing evidence of the service of the summons in case of a default, as if it were a matter of course. This was a case of setting aside a judgment for an irregularity, which could have been amended, in order to give the other party an

opportunity to appeal, as justice seemed to warrant. (See Van Benthuysen *a.* Lyle, 8 *How. Pr.*, 312.)

The fact of an appearance having been given by the attorney, and thus appearing on the roll, cannot make a difference. The 246th section is, that the proof of service is to be filed upon *the failure to answer;* and section 281 is, "if the complaint *be not answered.*" An appearance is not noticed. The provision is equally inoperative whether an appearance has been had or not. The voluntary appearance under section 139 is equivalent to personal service of the summons, for all purposes of jurisdiction, and cures previous defects in process (6 *How. Pr.*, 439); but it cannot dispense with the observance of the provisions in question.

This appearance may remove, or enable the court to cure, the error of a judgment on the 13th of December, reciting a service on the 16th of December. This would give on the record itself something to amend by. And thus the case may be brought within the authorities distinguishing between irregularities, which do not affect the judgment proper, entered in the judgment-book under section 280, and irregularities rendering the subsequent proceedings invalid. (Gilmartin *a.* Smith, 4 *Sandf.*, 684.)

This case (which was approved by all the judges) settles several points pertinent to that before me.

The judgment should have been entered before the costs were adjusted. Here it was done on the same day. The judgment should be entered on the judgment-book. Then the costs should be adjusted upon the notice of two days, and shall be inserted by the clerk in the entry of judgment (§ 311). Such irregularities, as adjusting the costs without notice, and then entering up judgment, would not warrant the setting aside the judgment proper; but as the case showed a state of facts making it proper to vacate the whole judgment, and give liberty to answer, it was done.

It remains to ascertain how the case appears upon the merits, as far as they are now presented. The plaintiff, in his complaint, alleges that in the month of May, 1857, he was appointed by the defendants as assistant keeper of the corporation yard in Jane-street. The charter of 1857 went into effect on the 1st of May, 1857. (*Laws of* 1857, 874, ch. 446.) It repealed, as I

think, all the previous provisions in the successive amendments of the charter, from the act of April 7th, 1830, to that of June 14th, 1853, which may bear upon the subject. (See section 54.)

The 23d section of this charter is the only one which I believe touches the subject. The provision as to the executive department, called the street department, directs that it shall have, among other things, the care of public buildings and places.

Chapter 4 of the ordinances of 1859, organizes and distributes the powers and duties of officers and bureaus under this provision. Article 1, section 1, declares that the street department shall have the care of the public yards of the Corporation; and by article 11, section 105, the deputy superintendent of repairs and supplies shall have the care of the public yards and storehouses, and may, with the consent of the street commissioner, employ not to exceed two keepers for each of the public yards, whose pay shall not exceed two dollars per day.

Unfortunately, in the useful compilation of the ordinances of 1859, the dates of their original adoption, respectively, are not given. They were submitted in a body in June, 1859. (See Preface.) No doubt this and others had been adopted before.

It is stated in the comptroller's affidavit, that the plaintiff had been removed from his office by the then acting city inspector, in January, 1858; and that his term of office expired under the said city inspector, with the expiration of the term of such city inspector, on the 31st of December, 1858.

It may be that under the 19th section of the charter of 1849, an ordinance has been passed which has given the city inspector power in the matter, and a right to appoint assistants. How such powers could exist after the 1st of May, 1857, or at least after ordinances passed under the charter of 1857, does not seem clear. The revised ordinances of 1845 do not help us.

With the very little light I possess upon this subject, I must be guided by what is sworn to in the affidavit of the comptroller.

That makes a case of an appointment by the city inspector,—of a removal by him, and of the termination of this office, because dependent on that of the inspector who had appointed him, and which took place on the 31st of December, 1858; also, that the plaintiff has never done any service since the 5th of January, and has been engaged in other employments.

This, at least, would throw great doubt upon the plaintiff's right to recover.

The order to show cause does not specify the grounds of irregularity to which I have alluded (*Rule* 39), and the plaintiff, in strictness, had a right to have them specified, that he might meet them. The defendants are, however, entitled to renew the motion in such a case as the present. (Bowman *a.* Sheldon, 5 *Sandf.*, 657.) If the plaintiff thinks he can gain any thing by it, this will be the course. The application will be denied without costs, with liberty to renew it. Otherwise it will be granted.

ANONYMOUS.*

New York Superior Court; before Hon. Murray Hoffman, Referee, September, 1862.

DIVORCE.—ADULTERY.—EVIDENCE.—WITNESS.—CREDIBILITY.—INTEREST.

Adultery committed by the plaintiff is a perfect defence to an action for an absolute divorce, and is also a ground for affirmative relief in the same action.†

The testimony of a witness employed to watch and detect a husband or wife suspected of adultery, though it is competent, and ought not to be absolutely rejected, is to be received with great caution, and scrupulously and minutely scrutinized.

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* This cause was very earnestly and thoroughly litigated upon the questions on which it turned; and although it was tried, and the opinion prepared, by Judge Hoffman, while sitting in the capacity of referee, after he had left the bench of the Superior Court, it is deemed not the less valuable as an exposition of the law by so able a hand.

The report of the referee, made in accordance with this opinion, was confirmed by the court; and judgment was entered thereon in November, 1862, and notice of its entry given; but no appeal was taken.

† In McNamara *a.* McNamara (9 *Ante*, 18), it was *Held*, that in an action for a limited divorce, the defendant may interpose a demand for a like decree against the plaintiff. But in Diddell *a.* Diddell (3 *Ante*, 167), and in Griffin *a.* Griffin (23 *How. Pr.*, 183), it was *Held*, that in an action for an absolute divorce, on the ground of adultery, the defendant could not interpose a demand for a limited divorce for cruel and inhuman treatment. (See, also, Linden *a.* Linden, 36 *Barb.*, 61.)

Bad repute of a witness in former years, of such a degree as to destroy his credibility, is treated as continuing, until, by the production of full evidence, a change of reputation from change of conduct is shown.

In averring the offence, in an action for divorce on the ground of adultery, precision as to time, place, and circumstances is required.

Examples of sufficient and insufficient averments in this respect.

Evidence of adultery in an action of divorce must accord with the allegations of such offence in the pleadings.

The fact that a witness is a prostitute, and the keeper of a house of ill-fame, does not warrant an entire rejection of her testimony; but a conviction of adultery should not be founded on facts established by her evidence solely.

So, where the circumstances as to which she is corroborated do not inevitably lead to the conclusion that adultery has been committed, her testimony is insufficient.

Proof of two or three visits to a brothel, by a husband, unaccompanied by a woman, is not sufficient evidence of adultery to authorize a divorce.

While to authorize a divorce for adultery, direct proof of the actual commission of the crime is not required, yet the proximate facts must lead by a fair inference to a necessary conclusion, a conclusion so far inevitable that the supposition of innocence cannot by any just course of reasoning be reconciled with it.

Trial by Referee.

This action was brought by a husband to obtain an absolute divorce from his wife, on the ground of alleged adultery on her part. The answer denied the adultery and charged the plaintiff with the commission of the like offence, and claimed judgment in favor of the defendant for a dissolution of the marriage contract on the ground of adultery. The pleadings were verified. The issues were referred by consent to Hon. Murray Hoffman, to hear and determine. The evidence taken before him sufficiently appears from the opinion.

William C. Traphagen and *Jas. T. Brady*, for the plaintiff.

John L. Sutherland and *L. B. Woodruff*, for the defendant.

Murray Hoffman, Referee.—The investigation of this interesting case will be conducted under two leading heads. *First*, upon the case made under the plaintiff's complaint as to the adultery of the defendant; *second*, upon the defendant's recriminating charges of adultery committed by the plaintiff. The last, if established, serves not merely as a perfect defence to the plaintiff's action, but will afford a ground for the affirmative relief asked for in the answer.

I consider the decision of Justice Bosworth, in the case from 11 *N. Y. Leg. Obs.*, 350 (B. *a.* B.), as sufficient, if not decisive authority for this last proposition; it is also sustained by reasoning entirely satisfactory.

I. Upon this first issue, I shall examine the direct evidence given by the plaintiff; what it proves, assuming it to be credible; and what portion of it is credible or otherwise.

W., the leading witness, swears directly and positively to the following facts, of which he made memoranda at the time. That the defendant and Y., her alleged paramour, were in his room or her room many times, and at late hours of the night, till twelve o'clock and later. On one particular night, between twelve and one o'clock, he saw Y. come out of her room with nothing but his night-shirt on; was without drawers. On another occasion, he was in bed and sick. She was partly on the bed kissing him, her breast was on his. On another night, about one o'clock, he saw Y. go into her room, with nothing on but his night-shirt, that he could see. He heard the bed move as if there was some action upon it. Other instances are mentioned by him of a similar nature: and he says that on these occasions, at such late hours, they were alone.

If these statements came from a credible witness, who had escaped a severe cross-examination without inconsistency in material matters; and brought to the stand an unblemished character, they would need very little, if any, corroborating evidence, to justify a sentence for the plaintiff.

But W. was hired as a spy to watch the conduct of the defendant; to supply the testimony necessary for the plaintiff's purpose. There is no legal evidence that the plaintiff employed K., who employed W. I could scarcely resist the presumption that he did so, if it were essential to make it; but I consider it unimportant.

Whatever discredit properly attaches to the witness, results from his engaging in this employment for money; impelled by an irresistible impulse to serve his employer, earn or increase his compensation, and with the reward depending on success.

But a case within my own knowledge, where a clergyman was entrapped into a marriage with a harridan, whose cunning was equal to her infamy, and drove him to use similar means

as the only mode of extrication, has taught me that crime may remain wholly undetected, if evidence from such a source be disregarded. And the only rule can be, that the judge should give the most scrupulous and minute consideration to every thing that is stated by such a witness. These observations are confirmed by Dr. Lushington, in Ciocci *a.* Ciocci (26 *Eng. L. & Eq. R.*, 604, 613).

I do not find that the cross-examination of W. has shaken his testimony. I have not found any thing of contradictions or inconsistencies from his own lips to impair his own statements, and this test of truth has failed to prove him false or unreliable.

But his character for truth and veracity has been most seriously impeached. It is an inevitable conclusion, that if the character he maintained in Connecticut is to be adopted as the test, he is utterly unworthy of credit. In my experience, I never met with a case in which the trustworthiness of a witness was more effectually destroyed. Nor can I think that it would be unjust or illogical to presume, that the repute then earned must be treated as continuing, until full evidence is produced of a change of reputation from a change of conduct.

But besides this, some testimony proves that there has been no change or reformation since his removal to New York.

The evidence to repel all this, and support his character, is very slight. With but one exception, it comes from persons who never heard any common acquaintance speak of his character. They give their own opinions. The exception I refer to is that of a witness whose evidence is of little weight.

I cannot then but say, that this witness brings to the stand a reputation so successfully assailed for truth, that I may not rely on his testimony at all. I must strike it from the case, and must find ground for the judgment sought by the plaintiff as if it had never been given.

The next witness to support the plaintiff's case is J. M. B.

I have read and reread his testimony with great care. I need not give it in detail, or in substance. My conclusion is, that standing alone, it would be plainly insufficient to establish guilt. That it might by itself alone prove a suspicious intimacy, and in minor yet pertinent matters tend to corroborate W.'s, is not to be disputed. But by itself, it never could warrant a judgment for the plaintiff.

The witness is open to the same tinge of discredit as W., from being hired to watch the defendant.

The witness denies stating to two other persons his ignorance of any thing tending to prove the defendant guilty. Both of these parties contradict him.

I conclude that the plaintiff's case is not made out by the testimony on his behalf, without any reference to the defendant's evidence, other than as it relates to the general reputation of W., and the contradictions of B.

But when the defendant's direct evidence is considered, the pointed testimony of Y., who, I think, is entitled to belief, and the corroboration of others, the result seems inevitable that the plaintiff has wholly failed in his case.

II. I come now to the far more difficult part of the case—the allegation, in the answer, of the plaintiff's criminality.

The statements in the pleadings must first be noticed.

The offences are first charged in the fifth article, in general terms, as having been frequently committed since the marriage, with persons unknown and at places which the defendant cannot specify. *Next*, it is averred that between the first of May, 1860, and the first of November, 1861, the defendant was a frequent and regular visitor at No. 52, in a designated street, a house kept by Ann Richards for the purposes of assignation and prostitution.

That the plaintiff visited such house for the purpose of having illicit intercourse with one or more females whose names are unknown, and did, during such period, commit adultery with one or more females whose names are unknown, "and at the particular times and under the particular circumstances specified in the seventh and eighth paragraphs of this answer; and at various other times during said period, at said house, which this defendant is unable to specify, and with one or more females whose names are unknown to this defendant."

The seventh paragraph is, "that the plaintiff, on the first or second Saturday of October, 1860, committed adultery with a female whose name is not known to this defendant, at the house known as number fifty-two in said street, in the city of New York, between the hours of three and five o'clock in the afternoon; and that on the day aforesaid said house was kept as a house of prostitution or assignation."

And the eighth paragraph is, "that as this defendant has been informed and believes, the plaintiff, on the Wednesday succeeding the first or second Saturday of October, 1860, committed adultery with a female whose name is not known to this defendant, in the house known as street-number fifty-two, in said street, in the city of New York, between the hours of three and five o'clock in the afternoon, and that on the day aforesaid said house was kept as a house of prostitution and assignation."

Rejecting the allegation in the fifth article as entirely too vague, we have three allegations in the answer: 1st. The specific charge of the offence being committed on the first or second Saturday of October, 1860; 2d. The specific charge of the offence on the Wednesday succeeding such Saturday; and 3d. The charge of the commission, at the same place, at various other times, during the period from the first of May, 1860, to the first of November, 1861, and all with persons unknown.

The rule as to precision in averring the offence, as to time, place, and circumstance, is strongly stated by Chancellor Walworth, in Wood *a.* Wood (2 *Paige*, 108), and the history of the case of Germond *a.* Germond, there cited, is a striking example of the danger of allowing laxity of allegation in the material particulars of time, &c.

See, also, Walton *a.* Walton (32 *Barb.*, 203; S. C., *sub nom.* Anonymous, 11 *Abbotts' Pr.*, 231), as to suits for separation; and see the valuable remarks of Dr. Lushington on the maxim, *secundum allegata et probata*, as applicable to such cases, in Eaton *a.* Eaton (7 *Notes of Cases in Ecc. Courts*, 1–27).

In examining the evidence, with the allegation to which it can apply always in mind, I am satisfied that the testimony I admitted of Margaret Roberts ought not to have been received. A motion was made to strike it out, which was denied. I shall now grant it, and give the other side the opportunity to except, or take such other course as may be advised.

Her testimony goes first to prove the plaintiff's visiting Mrs. Willard's, a house of ill-fame, at a designated place in Sixth Avenue; she fixes this in her direct examination as in August, 1861. I pass over the subsequent contradictory statement which fixes her residence in another street at that time. She next testifies as to what took place on a steamboat, going up

the North River in the summer of 1860, where the plaintiff was in the society of Mrs. Willard and the witness.

I think there can be no view in which the allegations of the complaint will warrant this testimony.

Anna Richards is the first material witness. If credible, she proves frequent visits, by the plaintiff, to her house of assignation, No. 52 —— street; bringing women with him, and their occupying a private room for a half-hour to an hour.

I do not think that her being a prostitute, and keeping a house of ill-fame, warrants an entire rejection of her testimony; but it does warrant a refusal to found a conviction of guilt on her evidence solely. Clear corroboration in an essential particular must be made out. Vice-chancellor McCoun, in Turney *a.* Turney (4 *Edw.*, 566), would not grant a divorce upon the evidence of two prostitutes. There was, however, also suspicious conduct on the part of the plaintiff. (See, also, Banta *a.* Banta, 3 *Edw.*, 295.)

And I understand the court, in Ciocci *a.* Ciocci (26 *Eng. L. & Eq. R.*, 604, 618), distinctly to hold the proposition, that the evidence of a prostitute standing alone is not sufficient.

Nor am I satisfied that I can wholly discard her evidence, on the ground of the testimony generally discrediting her for truth and veracity.

She is discredited strongly by what she says as to the explanation of the object of the parties coming to her house, and as to the very marked circumstances connected with the $50. She forgets that she received a package about that time of $50 from Captain Speight. But the captain deposes to his own opportune voluntary loan of that sum. She denies that she asked Hyatt to loan her money. He says she asked him for a loan of $50.

The circumstances of the transaction as to this $50, leave a deep impression upon my mind, that the witness was led to depose under the influence of this generous loan; that she cunningly denied its reception (her forgetfulness is almost incredible), from a consciousness of the effect of the disclosure, and that she "is as willing to bring her testimony to market, as to offer her person for sale."

I feel warranted in concluding that her evidence must not be relied upon to establish any material fact.

And here it is to be remarked, upon the point of corroboration, that while she swears to frequent visits, she is positive that the plaintiff always brought a female with him, and to her recollection, never went into a private room with any female but such as he brought. We have both Lavender and Buttrick swearing, that when they saw him enter, he was alone.

Now if the mere fact, assumed to be established by the witnesses, of two or three visits to the house alone, is insufficient to found a decree upon, then the evidence of Richards becomes essential to prove adultery. She, and she alone, swears to the plaintiff's retiring to a private room with females. Hence a decree must rest substantially on her testimony; without it, on the hypothesis presented, the adultery is not proven.

I do not understand that the doctrine of corroboration of a witness, strongly discredited, covers such a case. Confirmation as to the mere fact of entering the house, does not support her credibility as to the fact of actual adultery; or the proximate evidence of it, by retiring to a private room with a prostitute for an hour. I consider that the confirmation must be to the essential point on which the case depends.

And thus in either view, that of absolutely excluding the evidence of Richards, or demanding clear corroboration from others to admit it, the case must be decided by other testimony.

Second. How does it stand upon the evidence of Lavender and Buttrick?

The evidence of Lavender is positive that he saw the plaintiff go into No. 52, on two occasions, the 6th of October, and the Wednesday ensuing. A person had been pointed out to him as the plaintiff by Meredith, when he was employed to watch the house. He had seen him but once before: he recognized him as entering the house. He swears that he recognized the plaintiff as the same person, in March ensuing. Saw him come out of his own house, and is positive as to the identity. On the trial, the plaintiff being present, he swears also to the identity of the persons.

On these two occasions the plaintiff had not a lady with him.

I give but little weight to the statement as to the color of the dress and gloves, as to which a great deal of testimony for the purpose of proving this witness mistaken, has been produced.

The testimony of Buttrick is explicit, that in October or

November, 1860, he saw the plaintiff enter the house, No. 52. He saw him from No. 47, on the opposite side of the way. He was alone. The attempt to show that in the position he occupied he could not have seen what he states, has failed.

I consider it then to be proven that, on two occasions, the plaintiff entered the house No. 52, a house of ill-fame and assignation. I assume that he knew its character. It is, perhaps, a just inference that he went there three times. Yet this is not clear. Buttrick assigns October or November for the visit he saw. It may be that this was one of the occasions Lavender deposes to, as taking place in October. In each case he went in alone; no woman was with him.

I have then, on this deduction from the testimony, to deal with this proposition: Can a conclusion of adultery be founded solely upon the fact of a man being shown to have gone unaccompanied three times into a house of ill-fame, in the afternoon and daylight? The question is of interest and delicacy.

The aphoristic phrase has been quoted, that men do not go into brothels to say their *pater noster*. Let us examine to what extent this phrase indicates a rule of judicial decision.

Lord Stowell uses it in Loveden *a.* Loveden (2 *Hagg. Cons. R.*, 1). He speaks of it as an old saying; and that it is impossible persons could have gone to such places for any but improper purposes, and that it was universally held a proof of adultery.

This language is used in illustration of an argument as to the weight of proof of certain letters in the cause. Nothing in the case called for a decision upon the point, so as to have awakened the luminous judicial mind of that judge to caution in the use of language.

In Astley *a.* Astley (1 *Hagg.*, 74), the facts of the case were these: The evidence proved that the husband conversed with courtesans on a public race-course, and took a licentious liberty with the dress of one of them; that he promised to treat them if he won the race; that he was on the same evening at a brothel, knowing the character of the house before he went, and that at such house, he went up stairs with a prostitute, and remained alone with her, at least a quarter of an hour.

Dr. Lushington, after stating these facts, and holding them amply sufficient to raise the presumption of adultery, cites Elliot *a.* Elliot (mentioned by Lord Stowell, in Williams *a.* Williams,

1 *Cons. R.*, 302), as deciding that a woman's going to a brothel with a man furnishes conclusive proof of adultery. He expresses the opinion, that the rule should be the same as to a man; but, at any rate, it furnished a violent suspicion; to be rebutted, if it can be at all rebutted, by the very best evidence.

Popkin *a.* Popkin (1 *Hagg.*, 733, *n.*) is also cited. But there is nothing upon the subject, except that the libel alleged the habitual frequenting of brothels, and associating with common prostitutes.

In Williams *a.* Williams (1 *Hagg. Cons. R.*, 299), the case of Elliot *a.* Elliot is also quoted. It is quite clear that Sir William Scott assumes that the character of the house was known to the woman. He says: "It is almost impossible that a woman would go to such a place, except for a criminal purpose."

In Best *a.* Best (1 *Addams*, 411–437), there was positive proof of the woman and the *particeps criminis* going into a house of ill-fame, with the mistress of which the woman was acquainted.

In Kenrick *a.* Kenrick (4 *Hagg.*, 114), a witness, who was credited by the court, saw the wife (the defendant) go with a man into a brothel. Sir John Nichols said, "This goes far, with other circumstances, to establish adultery."

In Wood *a.* Wood (4 *Hagg. Ecc. R.*, 138), the woman was watched into a house of ill-fame, and here she met the alleged *particeps* several times.

Van Epps *a.* Van Epps (6 *Barb.*, 320), there is merely the statement by the learned judge of the general rule expressed by Lord Stowell, in illustration, and for the enforcement of his views of the evidence.

In Langstaff *a.* Langstaff (*Wright's Ohio R.*, 148), it was shown that the husband was frequently at a house of ill-fame, and had been seen on a bed with common prostitutes.

And in Betts *a.* Betts (1 *Johns. Ch.*, 197), a witness testified that he had been at a house of ill-fame once or twice with the defendant, but did not stay long; that he never saw the defendant alone with any woman at such places, nor did he know that he slept at such house, or that he had criminal intercourse with any one. The chancellor said, "He being once or twice in a house of ill-fame, in the manner stated, was too slight and equivocal a circumstance to supply the defect of other proof."

In this case, at least, the presumption arising from being in a house of ill-fame was repelled by the ignorance of the witness as to intercourse with a woman there, or of the parties having slept there.

This review of the authorities shows quite clearly that it has not been decided in any of them, that the conclusion of guilt is to be deduced from the naked fact of two or three visits to a brothel, unaccompanied by a woman.

The general rules as to the degree and nature of the evidence demanded, are too well known to justify a statement in detail. While direct proof of the actual commission of the crime is not required, yet the proximate facts must lead by a fair inference to a necessary conclusion. This is not a necessary conclusion in a strictly mathematical or logical sense. The subject and the conditions of the evidence do not admit of this. But it must be a conclusion, so far inevitable, as that the supposition of innocence cannot, by any just course of reasoning, be reconciled with it. (Rix *a.* Rix, 3 *Hagg. Ecc. R.*, 74; Cadogan *a.* Cadogan, 2 *Hagg. Cons. R.*, 6, *note;* Loveden *a.* Loveden, *Ib.*, 1; Williams *a.* Williams, 1 *Ib.*, 299; Dunham *a.* Dunham, 6 *Law R.* (*Mass.*), 139; Van Epps *a.* Van Epps, 6 *Barb.*, 320.)

I have studied the evidence in this case with all the care I can exercise. I have examined the testimony in a multitude of leading authorities upon the subject. I find no case in which a judgment of divorce has been pronounced upon facts so slight as the sifted testimony in the present instance affords. Whatever suspicions exist in my mind; whatever results my own individual views may deem most probable, I cannot judicially say that the plaintiff has been guilty as alleged. The formula of a Scottish verdict, *not proven*, expresses my conclusion.

FOWLER *a.* WESTERVELT.

Supreme Court, Second District; General Term, Oct., 1863.

JUSTICES' COURTS.—APPEAL.—NEW TRIAL.—AVERMENT OF REPRESENTATIVE CAPACITY.—COMMISSIONERS OF HIGHWAYS.—COMMUTATION-MONEY.—OVERSEER OF HIGHWAYS.—FORM OF ASSESSMENT.

Under section 352 of the Code, as amended in 1862,—which gives a new trial in the County Court,* upon an appeal from a justice's court, when the amount litigated exceeds fifty dollars,—the new trial in the County Court is a matter of right, not to be withheld for any want of particularity in the statement of the grounds of appeal.†

Thus, a statement in the notice, that the judgment appealed from was against law and evidence, was *Held*, sufficient to sustain the appeal.

An objection to the form of the complaint, not taken before the justice, cannot be raised before the County Court on the new trial provided for by section 352 of the Code of Procedure.

In actions brought by the plaintiff in a representative capacity, an averment in the body of the complaint of such representative capacity, and also that the action is brought by him in such capacity, is sufficient to sustain a recovery in that capacity.

In an action by "F. H. & J., commissioners of highways," the complaint commenced: "The plaintiffs, commissioners of highways, complain." *Held*, that a cause of action in the plaintiffs, as commissioners, could be proven.

Commissioners of highways are entitled to claim from an overseer, before his annual accounting, the commutation-money received by him from a corporation, whose principal office is not situated in their town.

It seems, that the rule is otherwise as regards money received from lands assessed as the property of non-residents.

The commissioners of highways of the town of Hyde Park assessed highway labor against "H. R. R. Road," it not otherwise appearing from the list whether the assessment was against the lands of a non-resident or against the H. R. R. Road Co., a stock corporation, whose principal office was not in Hyde Park. The H. R. R. Road Co. had been assessed on the previous year's assessment-roll. *Held*, that the assessment was against the corporation, and not against its real estate as land of a non resident.

Appeal from a judgment of the Dutchess County Court.

* Also in the Buffalo Superior Court, by the amendment of 1863. *Laws of* 1863, ch. 392.

† But in order to costs, particularity is necessary by section 354.

This action was brought by Jonathan C. Fowler, John K. Hewlett, and Henry E. Jewell, commissioners of highways, of the town of Hyde Park, against Casper Westervelt. The action was first tried before a justice of the peace. The plaintiffs were commissioners of highways of the town of Hyde Park; and the defendant was acting overseer of road-district No. 28, of Hyde Park, having been appointed as such by the commissioners, but never filed an acceptance of the office in the town clerk's office. In making their assessments of highway labor for the year 1862, the commissioners assessed the "H. R. R. Road" for 273 days in district No. 28. This labor was commuted by the payment to defendant of $170.62, all of which, with the exception of $55, had been expended by him on his district before the commencement of this action, which was brought to recover the amount then remaining in his hands.

The answer denied the allegations in the complaint, and also pleaded a set-off, but no evidence was given to sustain the set-off upon the trial. Upon the trial before the justice, the jury rendered a verdict of "no cause of action," and judgment was entered in favor of the defendant for $4.18 costs, from which the plaintiffs appealed to the County Court, specifying as grounds of appeal:

1st. That the justice erred in admitting evidence of defendant under objection of plaintiffs.

2d. That the justice erred in refusing evidence offered by plaintiffs.

3d. That the judgment is against law and evidence.

On the trial before the County Court, the defendant moved to dismiss the appeal for want of jurisdiction, and also moved for a nonsuit at the close of the testimony, which motion was renewed upon the whole case, both of which motions were denied by the court, and exceptions taken. The court also refused to charge the jury as requested by defendant, to which exceptions were also taken. The jury found a verdict in favor of the plaintiffs of $55, and judgment was entered in their favor of $106.74, from which the defendant appealed to this court.

Wilber & Van Cleef, for the appellant.—I. The grounds of appeal from the judgment in the justice's court, as set forth in the notice of appeal, were not sufficient to give the County

Court jurisdiction, and the appeal should have been dismissed. 1. No evidence admitted by the justice in behalf of the defendant was objected to by plaintiffs, and no evidence offered by plaintiffs was refused. 2. The grounds of appeal are too vague and general. (Derby *a.* Hannin, 5 *Abbotts' Pr.*, 150; S. C., 15 *How. Pr.*, 32; 2 *Sandf.*, 632; 14 *How. Pr.*, 307; 16 *Ib.*, 471; 2 *E. D. Smith*, 123; *Code*, § 371.)

II. The county judge should have granted a nonsuit. 1. This action is brought by the plaintiff in their own names. They have sued as individuals, not as commissioners of highways. The words commissioners of highways in the summons and complaint, are merely *descriptio personæ*, and this error can be taken advantage of at any stage of the cause. (19 *Barb.*, 179.) 2. The complaint does not show by proper averments that this action is brought by the plaintiffs as officers and not as individuals. (Gould *a.* Glass, 19 *Barb.*, 179; Merritt *a.* Seaman, 6 *N. Y.*, 168; 6 *Hill*, 240; 24 *Wend.*, 345; 26 *Ib.*, 605.) The complaint is not merely defective in form but in substance, as it fails to show any right of action in behalf of the plaintiffs, as commissioners of highways. A defective title is as fatal in a justice's court as in a court of record. 3. The declaration should have stated specifically the cause of action arising under the statute. (Bartlett *a.* Crozier, 17 *Johns.*, 439, 456.) This appears to be a sound and well-settled rule of pleading in actions founded upon statute. (4 *Johns.*, 193; 7 *Ib.*, 402; 8 *Ib.*, 218; *Ib.*, 342.) 4. If defendant was guilty of any neglect or refusal, he is only responsible under the section which prescribes a penalty. (1 *Rev. Stat.*, 504, § 16.) 5. The defendant was not bound to pay over any moneys collected by him as overseer until the rendering of his annual account. (1 *Rev. Stat.*, 512, § 51.)

III. The County Court erred in not granting a nonsuit upon the whole case. 1. It appears by the highway list, that the labor was assessed against the "H. R. R. Road," and *not* against the Hudson River Railroad Company or corporation. This list is conclusive against the plaintiffs. (1 *Rev. Stat.*, 507, § 24.) The right of action, if any exists, in favor of plaintiffs, arises under Laws of 1837, ch. 431, §§ 1–3, in which the assessment is, without exception, referred to as made against the corporation. 2. If the "H. R. R. Road" is a corporation

under the provisions of these sections, either a compliance with the law or an enforcement of its penalties is impossible. 3. For a non-compliance with this law, such corporations are liable to the same penalties as in the case of individuals, which are to be collected in the same manner. (1 *Rev. Stat.*, 510, §§ 41–43.) The territorial jurisdiction of a justice is confined to the county in which he resides, and the law thus becomes impossible of execution. If, however, the H. R. R. Road is to be regarded as non-resident land, the law has made ample provision for the enforcement of its penalties. (1 *Rev. Stat.*, 511, §§ 47–50.) 4. The commissioners are to be guided in their assessment by the manner in which the assessors had made their assessment. (People *a.* Pierce, 31 *Barb.*, 138.) By reference to the law regulating the taxation of corporations, it will be seen that the assessors assessed the property belonging to the H. R. R. R. Company in the town of Hyde Park, as non-resident land.

Joseph F. Barnard, for the respondents.—I. The commissioners of highways are specially by statute entitled to demand and receive from any overseer, the whole or any part of the commutation-moneys received by such overseer of a corporation for highway labor, to be expended in other districts. (*Laws of* 1837, 488, ch. 431, § 3.)

II. The commissioners are to assess as inhabitants of the town all stock corporations which shall appear on the last assessment-roll of the town. (*Laws of* 1837, 488, ch. 431, § 1; People *a.* Pierce, 31 *Barb.*, 138.)

III. Lands of non-residents occupied and improved, are to be assessed as if owner was resident. (*Laws of* 1832, 170, ch. 107, § 1; *Laws of* 1835, 163, ch. 154, § 1.)

IV. The tax being legally imposed and paid, the commissioners have the right to bring this action, and are not compelled to await the account of the overseer at the end of the year, which has reference generally to unexpended moneys in his hands, and not to such portion of corporation commutations as they may demand. (1 *Rev. Stat.*, 512, § 51.)

V. If issue be taken by answer instead of demurrer, objection cannot be taken on appeal to form of complaint. (10 *Wend.*, 254; 15 *Ib.*, 669; 3 *Barb.*, 609; 4 *Ib.*, 361; 1 *Den.*, 504.)

By the Court.*—Scrugham, J.—The amount of the claim of the plaintiffs, litigated in the justice's court, exceeded fifty dollars, and on appeal to the County Court, the appellant was entitled to a new trial as a matter of right, not dependent upon error in the proceedings in the justice's court. (*Laws of* 1862, 853, ch. 460, § 23.) He can only take his appeal by the notice prescribed by section 353 of the Code of Procedure, and it is necessary that he state therein the grounds upon which the appeal is founded; but as the appellate court, in such cases, cannot pass upon any question suggested by the grounds of appeal, but must proceed to a new trial of the action whether they can be sustained or not, there can be no reason for requiring particularity in their statements, and an allegation that the judgment was against law and evidence, is therefore on an appeal in such cases, a sufficient compliance with the requirement that the grounds of appeal shall be stated in the notice.

The motion for nonsuit in the County Court on the grounds that the plaintiffs had sued as individuals and not as commissioners of highways; and that the complaint does not aver that the plaintiffs are commissioners, was properly denied. It was founded upon an alleged inaccuracy in the complaint, and the objection should have been made in the justice's court, where, if necessary, the complaint might have been amended. Applying the rule that pleadings in justice's courts are to be liberally construed, and are not required to be in any particular form, but are sufficiently definite, if they are such as to enable a person of common understanding to know what is intended; it will be found that the complaint is not open to this objection.

The words, "commissioners of highways," are affixed to the names of the plaintiffs, in the title. It is true that this is merely "*descriptio personarum*," and following the authority of Gould *a.* Glass (19 *Barb.*, 179), the complaint would be bad if it did not, in addition to this, contain an averment that the plaintiffs were commissioners of highways. In this complaint, however, the title gives the names of the plaintiffs, with this description of them as commissioners of highways, and, in the body of the complaint, it is averred that "the plaintiffs, commissioners of high-

* Present, Brown, Scrugham, and Lott, JJ.

ways, complain." This sufficiently indicates the character in which they complain, and shows that the claim is made by them as officers and not as individuals. This case is distinguished from that of Gould *a.* Glass, as there were no words in the body of the complaint, in that case, indicating that the plaintiffs sued in their official capacity.

The principal question presented on the appeal is, as to the right of commissioners of highways to claim from an overseer, before his accounting at the end of the year, commutation-money, received by him from a corporation whose principal office is not situated in their town.

An overseer of highways has a right to apply and expend all commutation-moneys received from individuals residing in his district, in the improvement of the roads and bridges in that district; for the statute directs that it be expended there; but he has no right, without authority from the commissioners, to expend any part of the commutation-money received from moneyed or stock corporations; for the commissioners are given control over such money, and may expend it in any district in the town—the law intends that they shall exercise their judgment and discretion as to its application, and this could not be done if the overseer who receives it should be allowed to expend it in his district without authority from them. It is to provide against this that the statute authorizes the commissioners to demand and receive it from any overseer to whom it may have been paid. (*Laws of* 1837, 488, ch. 431, § 3.)

The money may be paid in the first instance to one of the commissioners; if it is paid to an overseer, he receives it for them, and it is his duty to pay over to them. Failing to perform this duty, they are entitled to demand it, and the demand in this case, we think, was sufficiently proved.

It is said that the commissioners assessed the real estate belonging to the Hudson River Railroad Company lying in the district, as lands of non-residents, and therefore that section 3 of chapter 431 of Laws of 1837, does not apply to the commutation-moneys received from them, but that under 1 Rev. Stat., 509, § 35, it must be applied by the overseer to the improvement of the roads in his district. Some force is given to this suggestion by the fact that the entry in the list made by the

commissioners, and by them delivered to the overseers, is as follows: "H. R. R. Road, 273."

It is conceded that the initial letters and the word "road" are to read as the "Hudson River Railroad." This is not the legal name of the corporation, but it is one often employed to designate it; and that it was used by the commissioners with that intention, rather than as a description of the land of the company, designing to assess it as the lands of non-residents, is apparent from the fact that it is not such a description of non-resident land as by law they are required to give. (1 *Rev. Stat.*, 506, §§ 22–24.)

Moreover, it was the duty of the commissioners in making the estimate and assessment of the residue of the highway labor to be performed in their town, after assessing at least one day's labor upon each male inhabitant above the age of twenty-one years, "to include among the inhabitants of such town among whom such residue was to be apportioned all moneyed or stock corporations, which appeared on the last assessment-roll of their town, to have been assessed therein;" and the Hudson River Railroad Company was one of the corporations which so appeared.

The case decided in this district (People *on rel.* Hudson River R. R. Co. *a.* Pierce, 31 *Barb.*, 139), cited by the appellant as authority that the commissioners are to be guided in their assessment by the manner in which the assessors had made their assessment, is equally authoritative to the point that the commissioners must assess all moneyed and stock corporations which they find assessed on the last assessment-roll of the town, as inhabitants thereof, without regard to the place of their actual legal residence. It does not appear from the assessment-roll that the lands of the Hudson River Railroad Company were assessed as lands of non-residents. Such lands are to be assessed by description and not in the name of the owner; and the quantity contained in each lot is to be stated; and although the assessment is not in all respects such as is required to be made of the land of residents, it more nearly resembles that than an assessment of non-resident lands.

Nothing can be presumed from the position of the assessment on the roll, for it is neither among the assessments of residents nor among those of non-residents, but follows both.

We find no error in the proceedings in the County Court which will authorize a reversal of the judgment.

The judgment of the County Court should be affirmed with costs.

WORTMAN *a.* WORTMAN.

Supreme Court, First District; General Term, December, 1863.

PUBLICATION OF SUMMONS.—JURISDICTION.—DIVORCE.—SECOND MARRIAGE.

A judgment of divorce may be vacated for irregularity, affecting the jurisdiction of the person, even after the prevailing party has married again; but this should be done with hesitation, and only after the gravest and most careful consideration.*

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* In SINGER *a.* SINGER (at a *Special Term* of the same court in the ensuing month), it was *Held*, that from reasons of public policy, the court would set aside a judgment of divorce, shown to be obtained by collusion or fraud, even though it had been followed by marriage of the successful party; but that in such case it must be made apparent that the moving party was acting from good motives, and not from any expectation of personal advantage, such as regaining a support.

The cause came up on a motion made by the defendant to set aside a divorce.

The plaintiff and defendant were married in 1830. This action was commenced in 1859 for adultery charged against the defendant. The defendant appeared and put in an answer denying the adultery. The parties consented to a reference, and the referee reported in favor of the plaintiff. In January, 1860, a decree of divorce was granted. Since that time the plaintiff again married.

The defendant now moved to set aside the judgment, and to be allowed to defend the action, upon the ground that the same was obtained by collusion between herself and the plaintiff, with the consent of their attorneys; that such collusion consisted in an agreement that the defendant should make no defence except to serve the answer; that her attorney should make no cross-examination of the witnesses of the plaintiff, and would make no resistance to the rendition of the judgment against her.

INGRAHAM, J.—It was intimated on the motion that the consideration of this agreement was the payment of a sum of money, but no such fact is stated in the affidavits; nor is there any proof before me of any payment whatever, except the usual payment of alimony during the action.

Independent of any other considerations, if the motion was properly made, and in due season, the court would order any judgment of divorce obtained by collusion or fraud to be set aside, not from any regard to the parties concerned, but

Jurisdiction in actions commenced by publication of summons is strictly statutory, and can be acquired only in the mode prescribed by the statute.

The fact of defendant's non-residence, is insufficient to authorize an order for publication of summons: it must also appear that unsuccessful effort has been made to find the defendant within the State.*

Nor can such an order be sustained subsequently by proof that the defendant was not, in fact, within the State.

The validity of an order for the publication of summons, must be judged solely upon the sufficiency of the affidavits upon which it was granted.

Appeal from an order denying a motion to vacate judgment for irregularity.

This was an action by Jacob Wortman against Harriet Wortman for a divorce, on the ground of adultery. The summons was undertaken to be served by publication. The defendant did not appear. A judgment of divorce was ordered on the

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from motives of public policy. In such a case, however, it should be made apparent that the party so moving was acting from good motives, and not for any expected personal advantage.

But where the judgment of divorce has been acquiesced in, for the period of several years, and the plaintiff has again been married, some better reason than the mere gratification of personal feeling, or the desire to obtain a further sum of money from the plaintiff, should be made clearly to appear, before the court would be warranted in granting such an application. As I have already said, the ground on which such an order could be made would be one of public policy, but no such reason should suffice where, after the acquiescence of both the parties in the judgment for three years, an innocent person has become involved by marriage, and the opening of the judgment would involve her in distress, and perhaps disgrace. This reason alone would be sufficient to justify me in denying the motion, if there were no other reasons for doing so, and leaving the parties to the consequences of their own acts and agreements, after the long delay that has taken place.

But upon the merits, I do not think the collusion is made out in these papers sufficiently clear to set aside a divorce, even if there were no other objections thereto.

[The judge then reviewed the conflict of testimony upon which he came to this conclusion.]

Motion denied.

* In Irving Savings Institution *a.* Hardman (*Supreme Court, First District; Special Term*, 1858. *MS.*), it was held by Ingraham, J., that the only case in which a resident of this State can be proceeded against by publication under the provisions of the Code, is under the 2d subdivision of section 135. It is true that the first part of that section says, "When the person on whom service is to be made cannot be found, &c., within the State;" but that is qualified by the latter part of the section, which defines the special cases to which these general words apply.

30th day of May, 1862. In April, 1863, the defendant made a motion, at special term, that the judgment be set aside and vacated for irregularity, because, among other reasons, the affidavit on which the order for publication was made did not show, or state, any facts to show that the defendant could not, with due diligence, be found and served with the summons within this State. The motion was denied at special term, by Mr. Justice Barnard, and, from the order denying such motion, the defendant appealed to the general term.

Anthony R. Dyett, for the appellant.—I. The judgment is void—because the defendant did not in fact reside in Connecticut (nor out of this State) when the suit was commenced; nor subsequently, up to the time when judgment was rendered. (Fiske *a.* Anderson, 12 *Abbotts' Pr.*, 8.)

II. The affidavit of her non-residence, upon which the order for publication was based, is entirely upon information and belief; and that, too, derived from the plaintiff. There was nothing for the judge's mind to act on judicially, and it was not sufficient to confer jurisdiction. (14 *Wend.*, 237; 20 *Ib.*, 77; 18 *Ib.*, 611; 11 *Johns.*, 175; 26 *Barb.*, 562; 6 *Abbotts' Pr.*, 97; 17 *How. Pr.*, 106, 559; 14 *Ib.*, 380; 13 *Ib.*, 43, 349; 4 *Den.*, 93, 592; 12 *Abbotts' Pr.*, 359; 3 *How. Pr.*, 109; 9 *Johns.*, 75; 9 *Abbotts' Pr.*, 66; 5 *How. Pr.*, 46; 3 *Cow.*, 206; 5 *N. Y.*, 164; 16 *How. Pr.*, 371; 18 *Ib.*, 248; 1 *Cr. & J.*, 401.)

III. The only allegations of adultery in the complaint are adultery in Brooklyn with S. B., and at the same place with some person unknown. Proof was given of adultery at New York. It is impossible to say that this did not influence the judgment. The charge in the complaint is the one to be proved, and no divorce can be granted upon proof of a charge not contained in the complaint. (Wood *a.* Wood, 2 *Paige*, 108; 12 *Abbotts' Pr.*, 331; *Code*, § 276; 4 *Sandf. Ch.*, 622.) The defendant had a right to make default, and leave plaintiff to prove *his charges*. But he has no right to make new ones, of which we have had no notice. But again, the second charge of adultery was altogether too indefinite to admit any evidence of it to be given. (2 *Paige*, 108; 2 *Johns. Ch.*, 224; 4 *Barb.*, 217; 3 *Edw.*, 376, 389; 6 *Johns. Ch.*, 347.)

IV. On the merits, the judgment should be set aside. Be-

sides, the weight of evidence is with us, that the defendant knew where his wife was to be found in this State, and had no reason to believe she resided in Connecticut. (Bulkley *a.* Bulkley, 6 *Abbotts' Pr.*, 307.)

V. The order appealed from should be reversed, and the judgment set aside and defendant permitted to answer. If there is any fear of doing the present wife any injustice, the court has power to let this judgment stand in the mean while. (Dunn *a.* Dunn, 4 *Paige*, 425.)

Arnold H. Wagner and *John Sedgwick*, for the respondent.—I. It appears by the affidavits on both sides, that defendant was in fact out of the State. It appears by the affidavit offered on behalf of plaintiff, that defendant had sent him a message to the effect that she did not intend to defend the action. It likewise appeared that plaintiff was diligent in inquiring where defendant was living, and was informed that she was at Norwalk: it appears that defendant actually knew of the pendency of the action.

II. To confer jurisdiction, the judge should have been satisfied, by affidavit, that the defendant could not, after due diligence, be found in this State. If any facts relevant to the inquiry appeared, the statute does not require that any mind except that of the judge granting the order should be satisfied. His granting the order is proof that he was satisfied. (Collins *a.* Ryan, 32 *Barb.*, 647; Staples *a.* Fairchild, 3 *N. Y.*, 41; Roche *a.* Ward, 7 *How. Pr.*, 416.) Two facts appeared: residence at Norwalk; non-residence in the State. The second is upon positive knowledge. The fact of non residence is evidence that the defendant cannot, after due diligence, be found within this State. (Vernam *a.* Holbrook, 5 *How. Pr.*, 3; Rawdon *a.* Corbin, 3 *Ib.*, 416.) The old practice was to consider affidavits upon information and belief, with a statement of the source of the information, sufficient. (2 *Barb. Ch.*, 396, 397; 3 *Hoffm.*, 51.) Warren *a.* Tiffany (9 *Abbotts' Pr.*, 65; S. C., 17 *How. Pr.*, 106), and Evertson *a.* Thomas (5 *Ib.*, 45), are consistent with the old practice. In the first, belief alone was averred; in the second, the source of information was not stated. The second refers to *Exp.* Haynes (18 *Wend.*, 611). The cases referred to is an authority in our favor. These two cases, how-

ever, are opposed to Van Wyck *a.* Hardy (11 *Abbotts' Pr.*, 473; S. C., 20 *How. Pr.*, 222).

III. To vacate this judgment will expose plaintiff to a charge of bigamy, and annul the present marriage upon vague affidavits, where there has been no opportunity for cross-examination. If this judgment be assailable for the reasons suggested, proceedings can be taken directly to set it aside, wherein the rights of all parties can be deliberately settled.

SUTHERLAND, P. J.—As this was an action for divorce, and as it appears that since the judgment of divorce was obtained the plaintiff has married again, I have arrived at the conclusion, that the defendant's motion, at the special term, should have been granted only after the gravest and most careful consideration, and I may say with great hesitation. But I am convinced, that to hold that the affidavit upon which the order for publication was made in this action authorized such order, would be establishing or approving a most mischievous and unauthorized precedent.

By the Code (§ 135), "Where the person on whom the service of the summons is to be made, cannot, *after due diligence*, be found within the State, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof, &c., and it in like manner appears that a cause of action exists against the defendant, in respect to whom the service is to be made, &c., such court or judge may grant an order, that service be made by the publication of the summons," in certain cases particularly specified in the section; the last of which is, "where the action is for divorce, in the cases prescribed by law."

Now the affidavit of the attorney for the plaintiff, upon which the order for publication was made, states "that the defendant resides at Norwalk, in the State of Connecticut, as deponent is informed and believes to be true, and is not, and has not been a resident of this State for more than eighteen months; that *by reason of such non-residence*, deponent cannot have the said summons and complaint served on her within this State." This is all there is in the affidavit, claimed as showing, or tending to show, that the defendant could not, *after due diligence*, be found within the State.

In my opinion, the affidavit, so far from showing or stating

any fact to show, that the defendant could not, after due diligence, be found within the State, contains a confession on its face, that no efforts or attempts whatever had been made to find the defendant within the State, because the defendant was a non-resident, or the affiant had been informed and believed she was a non-resident, and had been for eighteen months. The purport of the statement in the affidavit above quoted, plainly is, the defendant resides at Norwalk, in Connecticut, as I am informed and believe; she has not been a resident of this State for more than eighteen months; and, therefore, no effort or attempt has been made to find her within the State. Construe the affidavit most favorably to the plaintiff, and say that only the allegation, that the defendant resided at Norwalk, was intended to be made on information and belief; and that the allegation, that she had not been a resident of this State for more than eighteen months, was intended to be made positively, and of the affiant's own knowledge; and yet, we cannot hold that the affidavit was sufficient to authorize the order for publication, without disregarding, or nullifying the requirement of the Code, that it must appear by affidavit, to the satisfaction of the court or judge, that the person on whom the service of the summons is to be made, cannot, after due diligence, be found within the State; for the section of the Code containing such requirement, assumes that though the defendant be a non-resident, yet, that perhaps he may be found within the State, and plainly contemplates that some effort shall be made to find and serve the defendant within this State, though he or she be a non-resident.

Had the affidavit in this case stated, generally, that after due diligent search or inquiry, the defendant could not be found within the State; or had it presented for the discretion of the judge any fact to show that there had been any diligence or effort to find the defendant within the State, the case would have been very different; but viewing the allegation of the non-residence of the defendant, not as an allegation of a fact addressed to the discretion of the judge, to show any attempt or effort to find the defendant, or even inquiry for her, within the State; but as an allegation made by way of excuse, for not having made any such attempt, effort, or inquiry, I cannot avoid the conclusion, that the affidavit did not authorize the

order of publication, and that such order, and the subsequent proceedings, were irregular and void.

It would appear from the order for publication, that this is the correct view of the affidavit; for the order recites: "It appearing to my satisfaction, by an inspection of the summons and complaint herein, and from the affidavit of the attorney for the plaintiff, that the summons and complaint has been duly filed herein, and that due diligence to serve the same has been made, but without success, *as the defendant does not reside within the State*, but resides at Norwalk, in the State of Connecticut," &c.

Judge Allen says in Cook *a.* Farmer (12 *Abbotts' Pr.*, 359), "But the statutory proceedings for acquiring jurisdiction of absent defendants, must be strictly complied with to give the court jurisdiction. The jurisdiction is strictly statutory, and can only be acquired in the mode prescribed by the statute." (Hallett *a.* Righters, 13 *How. Pr.*, 43; Brisbane *a.* Peabody, 3 *Ib.*, 109; Kendall *a.* Washburn, 14 *Ib.*, 380. See, also, Van Wyck *a.* Hardy, 11 *Abbotts' Pr.*, 473; S. C., 20 *How. Pr.*, 227.)

This last case certainly went to the very verge of reasonableness, in holding the affidavit sufficient to satisfy the judge of the non-residence of the defendants, and of the inability to find them in this State, and to confer jurisdiction on the judge.

The affidavits read in behalf of the plaintiff on the motion, tending to show that the defendant was, in fact, not within this State when the order for publication was made, plainly are of no importance on the question, whether the order of publication was authorized by the affidavit on which the order was made. The question is, whether the order for publication was authorized by the affidavit, on which the order for publication was made. I think it was not, and therefore I am of the opinion, that the order appealed from should be reversed with $10 costs, and that the judgment in this action should be vacated.

Leonard, J., concurred.

Barnard, J., dissented.

KENNEDY *a.* EILAU.

New York Common Pleas; General Term, Dec., 1863.

SHIPPING.—FREIGHT.—ACTION BY MASTER.—PARTY IN INTEREST.

The master of a ship is entitled to sue in his own name for freight, even though he is not the owner of the ship, and the bill of lading was not signed by him.

Appeal from a judgment of the Fifth District Court.

The plaintiff, James Kennedy, was master of the steamship "City of Baltimore," one of the vessels of the "Liverpool, New York & Philadelphia Steamship Company," and brought the action as *master* of the vessel, for freight on merchandise, carried in that vessel from a foreign port, consigned to the defendants, David Eilau and another. The plaintiff, on the trial, proved that he was master of the vessel, the carriage by the vessel, the reception of the goods by the defendants under the bill of lading, and the amount of freight due. The plaintiff then rested. The bill of lading was not signed by the master, but by the agents of the vessel in Europe.

The defendant's counsel moved for a dismissal of the complaint before the justice, on the ground that the plaintiff, *not being a party to the contract*, showed no right of action; which motion was granted, and judgment rendered for the defendants.

From this judgment the plaintiff appealed.

James W. Gerard, Jr., for the appellant.—I. The general principle is, that all persons having *possession*, have a right of action arising out of the possession of the goods. This is the rule as regards all bailees, agents, factors, carriers, auctioneers, &c. (*Pars. Merc. L.*, 161; White *a.* Chouteau, 10 *Barb.*, 202; Green *a.* Clarke, 12 *N. Y.*, 343; *Story on Bailm.*, § 585; Minturn *a.* Main, 7 *N. Y.*, 220; 1 *Smith's Lead. Cas., Am. Notes*, 481, and cases cited.)

II. Authorities—both in admiralty and State law—hold that the *master* also has a lien on the *freight* for his advances,

charges, and even wages. (*Abbott on Ship.*, 187, *notes*, Am. ed.; 1 *Pars. Merc. L.*, 256.) He is liable also to the owners, if he deliver the cargo without the freight; and therefore, *for his protection*, has authority to collect it, and, of course, to sue for it. The master is also liable to the freighters personally for damages to the goods: he is considered also a carrier of the cargo. (Elliott *a.* Russell, 10 *Johns.*, 1; 1 *Pars. Merc. L.*, 384.) If he is liable to freighters on the goods personally,—*e converso*,—they must be liable to him for their part of the contract, *i. e.*, payment of freight. (Clarkson *a.* Edes, 4 *Cow.*, 470.) All these implied personal obligations of the master to the owners of the ship and cargo, give him a right to sue for the freight-money. Actual advances or supplies by the master, are not necessary to create a lien in his favor on the freight. It exists for mere *liability*. (Ingersoll *a.* Van Bokkelin, 7 *Cow.*, 670.)

III. The above principles and law apply, whether the bill of lading (which is a mere piece of evidence) is signed *nominatim* or not, by the master.

IV. Even if there is any thing in the position, that the bill of lading (which was introduced by the defendants) should be signed by the master, the fact that it is signed by general agents of the ship is sufficient. That binds the master, ship, and owners; they are all carriers jointly and severally, and can all (or one) be sued for injury to the cargo. A signature by agents binds principals, whether the principals are known or designated or not; and you can show by parol who are the actual principals and parties in interest, even on a written instrument signed only by the agent, without description. (Dykers *a.* Townsend, 24 *N. Y.*, 57.)

V. There is nothing in the Code to prevent the action being brought by the master. He is the party in interest, as entitled to possession of the freight and lien on it, as before shown, and therefore the party interested; and at any rate, under the cases, would be held "trustee of an express trust," as it is held that auctioneers and agents are trustees of an express trust. (*Code*, § 113.)

VI. It is a matter of public policy and mercantile necessity that masters should be allowed to sue. Otherwise, it would be impossible for ships, carrying a general or assorted cargo, to

recover freight in different ports, and to prove in each case the present ownership of the vessel, possibly by a multitude of owners in different parts of the world, constantly changing, and half the time unknown to the master.

Adolphus M. Petshaw, for the respondents.

By the Court.*—Daly, F. J.—The judge below dismissed the case, upon the ground that the master, not being the owner of the vessel, could not maintain an action in his own name to recover for the freight. In this he erred.

In Clarkson *a.* Edes (4 *Cow.*, 470), Justice Woodworth stated that an action for the freight may be sustained in the name of the master on the bills of lading for the benefit of the owners and possessors of the vessel.

In Shields *a.* Davis (6 *Taunt.*, 65), the objection was taken that the master who brought an action in his own name to recover for freight, was not the owner of the vessel. It was objected that in the declaration he averred that the goods were carried in his vessel, and as the evidence showed that he was merely the master, and not the owner, that the variance was fatal. But the court said that the master had a special property in the ship, because he had necessarily the control of it, and that the action was properly brought in his name.

In Ward *a.* Felton (1 *East*, 507), the master, who was not the owner, brought an action in his own name for the freight; and in the elaborate discussion which the case underwent, the general right of the master to maintain such an action was not questioned either by counsel or by the court.

The master has a special interest in the freight. He may hypothecate it. ("The Gratitudine," 3 *Chr. Robinson Ad. R.*, 196.) He has a lien upon it for any responsibility necessarily incurred on behalf of the vessel in a foreign port, which, after notice, he may enforce against the consignee, even though the latter may have paid the freight to the owner. (Gardner *a.* Ship "New Jersey," 1 *Pet. Adm. Dec.*, 227; Van Bokkelin *a.* Ingersoll, 5 *Wend.*, 315; 7 *Cow.*, 670; American Ins. Co. *a.* Coster, 3 *Paige*, 323.) As the general agent of the owner, in

* Present, Daly, F. J., Hilton and Brady, JJ.

respect to the vessel and the voyage, he is authorized to collect it; and when collected, he has the right, as against the owner, to retain it for his wages or advances (Van Bokkelin *a.* Ingersoll, *supra*); and as master, he has a lien upon the cargo while it remains in his hands, and may retain it until the freight is paid. (2 *Brown's Civ. & Adm. L.*, 82.) These rights and powers bring him within that class of persons who, having a special interest in the subject-matter, or thing, may always sue for it in their own name. (White *a.* Chouteau, 10 *Barb.*, 202.)

He is enumerated among this class in Brown's excellent treatise upon Actions at Law (p. 162), who says, "A captain of a ship for freight may sue in his own name to enforce a contract entered into by him as agent, as he has an interest in the contract."

Without pursuing the subject further, it is sufficient, upon these authorities, to say that the master, in his character as such, may maintain an action in his own name to recover for the freight.

The judgment should be reversed, with costs.

MORRELL *a.* CAWLEY.

Supreme Court, First District; General Term, Dec., 1863.

ACTIONS AGAINST MARRIED WOMEN.—SOLE TRADER.—SEALED INSTRUMENT.—ADMISSIONS.—MEASURE OF DAMAGES.

Although a sealed instrument executed by an agent who has only a parol authority, is not good in general, and will not sustain an action against the principal, yet admissions contained in it are competent evidence against the principal.

Thus, in an action for use and occupation of demised premises, the rent reserved in a sealed lease which was executed by defendant's agent, but is void for want of sealed authority to execute it, furnishes, as against the defendant, the measure of damages.

In an action against a married woman, her admissions are competent evidence.

A married woman may be sued, in all matters respecting her separate estate, as if she were single.

This rule applies to the form of the action as well as to the parties.

An affidavit bearing the signature of the adverse party, is properly received to prove admissions, without proof of the authority of the magistrate who administered the oath.

Appeal from a judgment.

This action was brought by John H. Morrell against Jane F. Cawley, to recover the value of the use and occupation of a store in Front-street, New York, for the six months terminating February 1st, 1862. The complaint averred that the defendant was a married woman, and carried on business in her own name, and that the premises were hired by her for the purpose of carrying on the said business, and occupied by her in carrying on the same. The relief demanded was judgment for $350, interest and costs. The answer denied all the allegations of the complaint, with the exception of the statement that defendant was a married woman.

The cause was tried at circuit, before Mr. Justice Barnard and a jury. At the commencement of the trial, defendant moved to dismiss the complaint, on the ground that the action was brought against a married woman, on an alleged contract made by her; that an action against the defendant, to be sustained, must be one in equity, to charge her separate estate, and not as brought in the present form of action.

The motion was denied: defendant excepted. The plaintiff called John R. Morris, who testified, "I am a justice of the peace for Queens County: know the defendant."

Defendant objected to witness giving any testimony as to what was done before him officially, as it had not been proved by any competent testimony that witness was a justice of the peace. The objection was overruled, and defendant excepted.

"The affidavit exhibited was affirmed to before me by Mrs. Cawley, and this and the complaint now shown me were signed by her in my presence."

Plaintiff read the affidavit in evidence: it was verified March 13th, 1862: it set forth that Samuel B. Cawley had been for some time her agent, and had the management of her business, and authorized to act for her in certain business matters therein specified.

Plaintiff then offered in evidence the complaint in an action by defendant against one Lyman, signed and verified by the

defendant. Defendant objected to its admission, on the ground that it was irrelevant to the issue now being tried, and that there was no sufficient proof of the official character of the justice before whom the affidavit was taken. The objection was overruled, and defendant excepted.

This complaint set forth that the defendant was at the time and times thereinafter mentioned a married woman, possessed of an estate separate from her husband, and was and had been for some time previous thereto engaged in the ship-chandlery business in the city of New York, under her own name and for her own benefit, as a separate trader, pursuant to the act in such case made and provided.

The plaintiff next proved the execution by Samuel B. Cawley, the husband of defendant, of a written lease of the premises, dated March 4th, 1859, signed "J. F. Cawley" (seal), and offered such lease in evidence.

Defendant objected. 1. There was no proof that the defendant had ever executed the lease herself, or given authority to her husband to do so for her. 2. At the time of the making of the lease, as she had no power to make any such instrument, personally or through her agent, it was absolutely void, and no action could be founded on such lease, or for any subsequent use and occupation, without a contract being made subsequent to the act of March 20th, 1860. 3. That the tenancy under such lease, and the subsequent use and occupation, was that of the defendant's husband alone, and he is the only person responsible for the rent.

The objections were overruled: defendant excepted. A witness testified that he had seen the defendant at her store on the premises specified in the lease; that she carried on the business of a ship-chandler there; that she occupied the first floor of the premises for her store, till about the 1st of November, 1861, when she moved out and relet the store to a tenant, who paid her rent; that she relet the upper part of the premises to various tenants.

After plaintiff rested, defendant moved to dismiss the complaint on the following grounds. 1. That the action was not properly brought against the defendant. That even admitting all the facts alleged by the plaintiff, the only remedy was by a proceeding in equity to charge the defendant's separate estate.

2. That there was no proof that Samuel B. Cawley, defendant's husband, was the agent for the defendant, at the time of the leasing of the premises No. 290 Front-street, or at any other time, except for the particular purpose mentioned in the affidavit and complaint in the case of Cawley *a.* Lyman. 3. That the defendant never leased the premises, nor was she aware of their being leased, nor of the continuing occupation of them. 4. The lease was absolutely void as to the defendant, and must be taken to be the act of her husband, and he alone is responsible for the use and occupation.

The motion was denied, and defendant excepted.

No evidence was offered by defendant. The jury rendered a verdict for the plaintiff for $355.25. Judgment was entered, and defendant appealed.

Dennis McMahon, for the appellant.—I. The court erred in admitting in evidence, as the foundation of the plaintiff's claim, the lease of the premises in controversy. 1. There was no proof that the defendant herself had executed the lease, or given authority to her husband to do it for her. The husband, to execute the lease properly on behalf of his wife, should have had an authority under seal, duly acknowledged by the wife. (2 *Rev. Stat.*, 135, § 6; *Ib.*, 137, § 7; Lawrence *a.* Taylor, 5 *Hill*, 107; Worrall *a.* Munn, 5 *N. Y.*, 229.) A husband cannot be constituted as the agent of his wife, although the latter may be of the former. (Snyder *a.* Sponable, 1 *Hill*, 567; Oulds *a.* Sansom, 3 *Taunt.*, 261; Birdseye *a.* Flint, 3 *Barb.*, 500, 510; Hunt *a.* Johnson, 19 *N. Y.*, 279; *Laws of* 1849, 528, ch. 375.) The action being for use and occupation, and the lease being under seal, by admitting it the statute was violated. (1 *Rev. Stat.*, 748, § 26.) The court permitted the instrument to be introduced in evidence, so that, in effect, it was making a judicial disposition of her estate on her mere contracts, without regarding the recording act. (1 *Rev. Stat.*, 758, § 10; Knowles *a.* McCamley, 10 *Paige*, 342; Ackert *a.* Pultz, 7 *Barb.*, 386; Ingraham, J., Owen *a.* Cawley, 36 *Barb.*, 52; S. C., 13 *Abbotts' Pr.*, 13.) 2. There was no proof of authority in the husband to execute an instrument in his wife's name, in 1859. It is exceedingly doubtful whether a married woman is so far an independent personage that her admissions during coverture

may bind her estate. (Birdseye *a.* Flint, 3 *Barb.*, 500.) 3. In March, 1859, the lease was void as to the wife, void as to her separate estate. It was good as to the husband; it was, in legal effect, his contract. (Watkins *a.* Abrahams, 24 *N. Y.*, 72.) The subsequent occupation under it was entirely that of the husband, and he alone is chargeable with the consequence of it, and is responsible for the rent.

II. An action for use and occupation is founded on contract express or implied, and lies only where the relation of landlord and tenant exists. (Croswell *a.* Crane, 7 *Barb.*, 191, 203; *Chitty on Cont.*, 331; Hall *a.* Southmayd, 15 *Barb.*, 32; Bancroft *a.* Wardwell, 13 *Johns.*, 489.) No such relation here existed. The lease was absolutely void as to the wife. The tenancy was, and continued to be, that of the husband only. (Watkins *a.* Abrahams, 24 *N. Y.*, 72.)

III. Taking it to be true that the defendant is liable to the plaintiff, the only mode of proceeding to enforce that liability is by a separate proceeding in equity, and not by an ordinary action at law, fashioned after the superseded action of assumpsit for use and occupation. Prior to the act of 1860, no personal judgment can be entered against a wife—i. e. *in personam.* (Watkins *a.* Abrahams, 24 *N. Y.*, 73; Brittin *a.* Wilder, 6 *Hill*, 242.)

IV. The court erroneously allowed in evidence the affidavit and complaint in Cawley *a.* Lyman.

V. The nature of the business carried on by the appellant was not shown, but it did appear that she was married before the enabling acts of 1848 and 1849 were passed. The enabling acts of 1848 and 1849 gave no power to her to make contracts, or enter into bargains binding her, in any shape or form whatever. (Ryder *a.* Hulse, 24 *N. Y.*, 372; Gates *a.* Brower, 9 *Ib.*, 205; Van Steenbergh *a.* Hoffman, 15 *Barb.*, 28; Switzer *a.* Valentine, 4 *Duer*, 96; Yale *a.* Dederer, 18 *N. Y.*, 265; Hauptman *a.* Catlin, 1 *E. D. Smith*, 729.) Nor to act as a sole trader and conduct a mercantile business in her own name. (Freeman *a.* Orser, 5 *Duer*, 476.) Nor to invest her husband with any power to act as her attorney in the transaction of any such business. (Oulds *a.* Sansom, 3 *Taunt.*, 261; Birdseye *a.* Flint, 3 *Barb.*, 500, 510; Hunt *a.* Johnson, 19 *N. Y.*, 279; Curtis *a.* Engel, 2 *Sandf. Ch.*, 287; Gates *a.* Brower, 9 *N. Y.*,

205; Petty *a.* Anderson, 3 *Bing.*, 107; Lovett *a.* Robinson, 7 *How. Pr.*, 105.)

VI. No proof of the value of the premises was submitted to the jury, except the lease, which was void as against the appellant, and improperly admitted in evidence. (1 *Rev. Stat.*, 748, § 26.)

Thomas C. T. Buckley, for the respondent.—I. A married woman, carrying on business for her own benefit, is to be sued as if she were a *feme sole.* (*Laws of* 1860, 157, ch. 90.)

II. There is nothing in the objection to the justice of the peace giving any testimony as to what was done before him officially, until somebody other than the witness himself proved that he was a justice of the peace. The plaintiff relied upon the admissions contained in her affidavit and complaint, both signed by her. The witness was only called to prove that she signed them, so as to make them binding as her admissions. But if it was necessary to show that she swore to them before they could bind her as to the admissions contained in them, his own oath that he was a justice, and acted as such, was proof of his authority to take an oath without producing his commission.

III. The admissions contained in the defendant's complaint, in the suit against Lyman, are most relevant.

IV. The exception to the judge's admitting in evidence the contract of hiring, is groundless. 1. There was proof to go to the jury that her husband was her general agent for her, carrying on her business in her name, which would include the hiring of a store to carry on the business—which hiring was ratified by her agent receiving for her the rent of parts of the building not used. (35 *Barb.*, 78; S. C., 21 *How. Pr.*, 309.) 2. As to the position that she had no power to make a lease, the answer is, that the action is not founded on the lease, but on her actual use and occupation, the contract of hiring being merely used to show the quantum of rent; and although it might be void as a contract, if she did not occupy the premises, yet if she did occupy them, the lease may be admitted as a piece of evidence with other facts to show the value. But if the action is based on the lease, it was a good lease to her, and she took an interest in the land. (*Laws of* 1849, 528, ch. 375; Fox *a.* Duff, *MS.* case.) 3. The tenancy, business, and the occu-

pation are everywhere shown to be hers, and not her husband's, who was merely her general agent.

V. The exception on the refusal to dismiss the complaint, is groundless. 1. The first ground of the motion I have already answered. 2. There was proof that her husband was her general agent to carry on her business. 3. There was proof that she was aware of the hiring, and of the continuing occupation by her personally. But if she occupied by her general agent, that is enough to bind her for the use and occupation after the statute, although she had never personally been in the store, and was ignorant of the contract of hiring.

VI. No exception was taken to the charge: the presumption is, therefore, that the judge properly submitted to the jury the rules of law applicable to the case.

Leonard, J.—The lease being under seal, was void for want of authority to the husband to execute it. No action could therefore be maintained on the lease as a contract of the defendant. The action was, therefore, properly brought against the defendant for use and occupation, if she could be subjected to any liability therefor by the facts.

Under the act of 1860, a married woman may be sued in all matters respecting her separate estate as if she were a single woman. (Barton *a.* Beer, 35 *Barb.*, 78.) This statute relates to the form of the action as well as to the parties.

The lease, although not good as the foundation of an action against the defendant, was evidence against her as an admission, if her husband was authorized to execute a lease for her without seal. It required no written authority to sign the defendant's name. The seal did not injure its validity as an admission.

Upon the question of the authority of the husband to act for the defendant, we have her affidavit showing that her husband was her authorized agent during the greater part of the time for which the rent is here claimed, and he also acted as her agent. When the rent was demanded of her, she made no objection that she had not occupied the premises. It also appears from the defendant's affidavit, and her complaint in the action against Lyman, that she was carrying on the ship-chandlery business on her own account as a separate trader. This evi-

dence, although slight, was sufficient to go to the jury in respect to the occupation of the premises by the defendant, and for the jury to consider whether the defendant knew of the lease, or had authorized her husband to lease these premises. If she carried on her own separate business, occupying these premises, and knew of the lease, or authorized one with or without seal, then the lease was admissible evidence to prove the rate of rent which the defendant ought to pay, and the objections taken by the defendant cannot be maintained.

The jury found in the affirmative on all these propositions.

The cause was properly submitted to the jury on the evidence, and the motion to dismiss the complaint denied. No exceptions were taken to the charge.

The judgment should be affirmed, with costs.

Barnard, J.—I concur in the conclusion to which Judge Leonard has arrived.

Sutherland, J.—I dissent. I see no way in which the plaintiff could recover in this action. The judgment, I think, should be reversed, with costs.

Judgment affirmed.

ANDERSON *a.* DICKIE.

New York Superior Court; General Term, Dec., 1863.

Annexing Case or Exceptions.—New Trial.—Review of Questions of Fact.

After judgment entered absolutely, a motion upon a case or exceptions, for a new trial, cannot be heard at special term.

After judgment entered absolutely, a case or exceptions cannot be annexed to the judgment-roll for the purpose of review, except by special order.

Where judgment was entered absolutely, the appellant subsequently made a case to which the respondent proposed amendments, and the case was settled on notice, but no leave was given to annex the case to the judgment-roll. *Held*, 1. That the judgment could be reviewed only for errors appearing in the judg-

ment-roll itself. 2. That the respondent was regular in bringing the appeal to argument on the judgment-roll alone.

Motion to strike cause from the calendar.

This action was brought by Maria Anderson against Patrick Dickie. The plaintiff had judgment, and the defendant appealed. Plaintiff noticed the appeal for argument, and placed the appeal on the calendar. The defendants moved to strike the cause from the calendar. The facts and grounds of motion are stated in the opinion.

Andrew Boardman, for the motion.

Ira D. Warren, opposed.

By the Court.*—Robertson, J.—This is a motion to strike the cause from the calendar of the general term, upon the ground that it was placed there, and notice of argument given, before the time for filing the case containing exceptions as settled had elapsed.

The case was resettled on the 20th of May, 1863; judgment had been entered on the verdict for the plaintiff, and the judgment-roll filed on the 28th of February previous. The case was served on the 30th of March last, and also a notice of appeal from the judgment. Amendments were proposed to such case, on the 2d of April last. The case was originally settled on the 2d of May, and notice of argument served by the plaintiff for the present term, on the 4th of May last. Notice of resettlement was given on the 9th of May last. After the 20th of May, a new notice of argument was served by the plaintiff, and also a notice that he would receive his copies of the case as late as the 29th of May last. Such notices of argument never were returned. No order ever was obtained allowing the judgment to be entered to stand as security merely; consequently it was absolutely entered; no motion having been made for a new trial at special term, on a case or exceptions.

The Code requires (§ 265) that all motions for a new trial on a case or exceptions must be heard in the first instance at special term, except when exceptions are directed to be heard in

* Present, Robertson, White, and Barbour, JJ.

the first instance at general term. General Rule 33 of the Courts of this State, also requires motions for a new trial to be made in the first instance at special term; otherwise both parties must be deemed to have acquiesced in the decision of the judge or referee, and the verdict of the jury or the report of the referee upon questions of fact.

Section 281 of the Code provides that exceptions or a case are to constitute part of the judgment-roll. General Rule 37 provides that a case or exceptions shall be filed by the party making them, within ten days after their settlement. After a judgment entered absolutely, a motion for a new trial upon a case or exceptions cannot be heard at special term. There is no general provision of law that a case or exceptions, when filed after filing the judgment-roll, may be annexed as matter of course to the judgment-roll for the purpose of review. It must in such case be done by special order. (Lynde *a.* Cowenhoven, 4 *How. Pr.*, 327; S. C., 3 *Code R.*, 7; Renouil *a.* Harris, 2 *Sandf.*, 641; S. C., 1 *Code R.*, 125; Church *a.* Rhodes, 6 *How. Pr.*, 281.) No such order seems to have been obtained in this case. A case or exceptions cannot therefore form part of the papers on an appeal, unless they are filed before the judgment-roll, or a motion for a new trial upon them has been made and denied, or they are ordered by the court to be inserted in the judgment-roll: or unless the exceptions are taken to the decision of the court on a trial without a jury, or the report of a referee, which being taken after it is made, must necessarily succeed the giving of judgment.

The judgment in this case was entered absolutely, and no motion for a new trial could therefore be made at special term on a case. If the judgment at special term be allowed to be reviewed, it can only be on a case or exceptions inserted in the record, for which insertion no order has been obtained. Without such order, the defendant could only have the judgment reversed for errors appearing in the judgment-roll as it stands (Hunt *a.* Bloomer, 13 *N. Y.*, 341), without either case or exceptions.

The plaintiff had a right to assume that it was not necessary for him, in order to be entitled to notice his cause for argument, to wait the filing of a case or exceptions which could not be used on the argument, unless an order was obtained inserting

it or them in the judgment-roll. If such order had been obtained, the defendant had a right to his ten days to prepare and file the case to be served, and the plaintiff's remedy for an omission would be under Rule 37. Not having obtained it, the plaintiff was entitled to assume the defendant did not intend to do so, and to notice his case for argument. When the case may be brought on for hearing, it may be a good cause for postponing it (in case such order be obtained), that being entitled to ten days to prepare the case or exceptions, such time did not expire soon enough to enable the defendant to have the eight days notice of argument in which to prepare for the argument of the cause.

As the case at present stands, I think the motion should be denied, with seven dollars costs to the plaintiff, to abide the event of the appeal.

MORRIS *a.* MORANGE.

Supreme Court, Second District; General Term, December, 1863.

TIME OF APPEAL.—SERVICE BY MAIL ON CLERK.

Unless notice of appeal is actually received by the clerk of the court within the time limited by the Code, the right to appeal is lost.

Service of papers upon the clerk of the court by mail, is effective only from the date of his actually receiving them.

Appeal from an order.

This action was brought by William A. Morris and George Kissam, executors, against Henry H. Morange and others, for the foreclosure of a mortgage: plaintiffs had judgment, and defendant Morange appealed. An order was made at Kings Special Term, directing that the notice of appeal from the judgment in this action, served on the clerk, be set aside and taken from the files of the court, on the ground that it was not served within thirty days after notice of the judgment. The defendant Morange appealed from the order.

The following is the opinion delivered at special term:

LOTT, J.—The notice of appeal was not filed with the clerk within the time prescribed by the Code. The deposit of it, although on the thirtieth day, in the post-office, was not a sufficient service on, or notice to the clerk, it having, in fact, not reached him until four days afterwards. (See Crittenden *a.* Adams, 5 *How. Pr.*, 310.) A notice by mail is only allowable in case of service on a party or his attorney under sections 408, 410, of the Code. The case, as presented, is therefore one where the notice of appeal was insufficient to give the appeal effect, and does not fall within the provisions of section 327, authorizing an amendment. (People *a.* Eldridge, 7 *How. Pr.*, 108.) I cannot, therefore, grant any relief to the defendant by which he can make his intended appeal effectual.

H. H. Morange and *E. A. Brewster*, for appellant.

T. F. Jackson and *D. P. Barnard*, for respondents.

BY THE COURT.*—SCRUGHAM, J.—Section 332 of the Code requires that an appeal must be taken within thirty days after written notice of the judgment or order shall have been given to the party appealing.

The appeal is taken by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specified part thereof. (*Code*, § 327.)

The time to appeal, in this case, expired with the 19th day of March, 1863, and on that day the defendant Morange deposited in the post-office, in New York, a notice of appeal, addressed to the plaintiff's attorney, "Brooklyn, E. D." and another to the "Clerk of Kings County, Brooklyn."

The object of section 332 is to limit the time within which appeals may be taken to thirty days, and unless notice is actually served on the clerk within that time, the right to appeal is lost. The Code and statutes have provided, that service of certain papers may be made in a manner therein specified; but, in the absence of such particular statutory provision, service of a written notice can only be made by the delivery of the paper

* Present, BROWN, SCRUGHAM, and LOTT, JJ.

to the person upon whom it is to be served. An actual manual delivery may not be necessary, but the receipt of the paper by the person to be served is essential.

The provisions of the Code (§§ 410, 411), for service by mail, only allow such service upon parties to actions and their attorneys; and while they render the service of the notice of appeal upon the plaintiff's attorney in this case sufficient, they have no such effect as to the notice which the defendant was required to serve upon the clerk.

The notice mailed to the clerk was not received by him until the 23d of March, 1863, four days after the time to appeal expired.

The order should be affirmed.

LOBACH *a.* HOTCHKISS.

Supreme Court, First District; General Term, Dec., 1863.

SHIPPING.—SALVAGE.—LIABILITY OF OWNER.—MOTION FOR NEW TRIAL.—CASE AND EXCEPTIONS.—APPEAL.—REVIEW OF LAW AND FACT.

In an action against a ship-owner to recover the amount of advances made to compromise a demand for salvage, evidence that the defendant claimed and received from the underwriters his share of the insurance on the basis of an adjustment of general average, which included the advances made by plaintiff,—*Held*, an admission of defendant's liability for such advances.

Advances obtained by a shipmaster to compromise a claim against ship and cargo for salvage, and thus enable the vessel to proceed on her voyage, are properly chargeable against the owner, irrespective of the fact that the master is interested in the voyage to such an extent that the owner might not be liable for ordinary advances.

Where an action has been tried by jury, and no motion made at special term or circuit for a new trial, a review upon the facts cannot be had at general term.

An appeal lies upon the law, from a judgment where there has been a trial before the judge and a jury, at circuit. The appeal is considered, however, only upon the exceptions taken.

Where the trial has been by the court or referees, an appeal can be taken to the general term directly, so as to obtain a review of both the facts and the law.

Appeal from a judgment.

The action was by William Lobach and John F. Schepeler against George Hotchkiss, owner of the schooner Stephen Hotchkiss, to recover $552.18, the balance of an amount expended by Fischer, Büssing & Co., of Vera Cruz, Mexico, in the year 1855, in settlement of a claim for salvage, and other disbursements, arising out of a stranding of the schooner at Alvarado, Mexico. The cause was tried before Mr. Justice Clerke and a jury.

The schooner was under charter to take a cargo to New York on account of the plaintiffs. She grounded, with the cargo on board, in going over the bar at Alvarado; was got off by a Mexican vessel of war; and a claim for salvage to one-third the value of the vessel and cargo presented. This was compromised through the exertions of Fischer, Büssing & Co., acting at the instance and by the request of the master, for a sum of $1,010.24; and the money advanced by Fischer, Büssing & Co. on the security of a bottomry bond, given by the master, accompanied by a draft on the defendant (the owner) for the amount. The bottomry bond also secured to the lenders a maritime premium of 15 per cent., amounting to $151.53.

After the departure of the vessel, the account of the American consul, for additional disbursements made by and fees to him, amounting to $700, was presented to and paid by Fischer, Büssing & Co., and forwarded by them to the plaintiffs, at New York, for collection against the vessel. These several amounts constituted a general average, to be paid by the vessel, cargo, and freight.

The draft for the $1,010.24 was forwarded by the plaintiffs to New Haven, Connecticut, where the defendant resided, and was paid by him on its presentation. Captain Munson, the master, on his arrival in New York, employed an average adjuster, to adjust the general average, who accordingly made up the average statement. The $1,010.24 and the $700 were both included in the average adjustment.

The defendant had insurances upon the vessel in two insurance offices in New York, to the extent of five-twelfths of the value of the vessel. On the completion of the general average adjustment, it was presented to each of these companies.

The defendant claimed and received from each five-twelfths of the amount awarded to him in general average as the owner

of the vessel, including the amount both of the bottomry bond, for $1,010.24, and the account of additional disbursements, amounting to $700. The balance of those amounts claimed by the plaintiffs in this action was the sum of $552.18, besides interest, which the plaintiffs had omitted to collect at the time, through mistake.

Various exceptions were taken by defendant at the trial, which are sufficiently manifest from the argument and opinion. The jury rendered a verdict for the plaintiff for the amount claimed, and interest; judgment was entered, and defendant appealed: no motion for a new trial had been made.

Dexter A. Hawkins, for the appellant.—I. The plaintiffs are not entitled to a verdict upon their own showing: hence a new trial should be granted. (3 *Grah. & Wat.*, 1187.)

II. The verdict is against the direction of the court: "that no claims can be allowed except the specified items in the bill of particulars."

III. A nonsuit should have been granted.

IV. The court erred in refusing to charge that the fact that the master sailed the vessel on shares, made the master owner *pro hac vice*, and relieves the general owner of liability for supplies and necessaries. (1 *Pars. Mar. L.*, 235; 8 *Johns.*, 272; Frazer *a.* Marsh, 13 *East*, 238; 1 *Pars. Mar. L.*, 111, *n.;* Reeve *a.* Davis, 2 *Nev. & M.*, 873; *A. & E.*, 312; 5 *Pick.*, 422; 1 *Gray*, 125; 16 *Law. R.*, 43; 4 *Greenl.*, 264; 16 *Maine*, 413; *Curtis C. C.*, 104; 15 *Johns.*, 298.) The same principle underlies numerous other decisions. (15 *Mass.*, 370; 16 *Ib.*, 336; 6 *Pick.*, 335; 12 *Ib.*, 355; 10 *Met.*, 402; 20 *Maine*, 213; 23 *Ib.*, 17; 26 *Ib.*, 185. See, also, 7 *Greenl.*, 261; 15 *Mass.* [Rand's ed.], 481, *a;* 8 *Johns.*, 572; 5 *Law Rep.*, 416.) The question is, whether the owner, by reason of the charter-party, has devested himself of the ownership *pro hac vice*, and whether there has been any direct contract between the parties varying the responsibility. (4 *Watts & Serg.*, 240; Webb *a.* Pierce, 1 *Curt.*, 10; see Saxton *a.* Read, *Hill & D.*, 323; Lines *a.* Howard, 40 *Maine*, 276; Valejo *a.* Wheeler, *Cowp.*, 143; 3 *Kent's Com.*, 193; *Abbott on Ship.* [8 ed.], *n.* 1, 6; Perry *a.* Osborn, 5 *Pick.*, 428.)

V. The court erred in refusing to charge that any advance

over $1,010.24 was made without authority, and not a charge against defendant.

VI. The court erred in refusing to charge that the bill of exchange for $1,010.24, having been accepted or paid before the arrival of the vessel, there was no maritime risk, and that the maritime interest cannot be allowed. (*Abbott on Ship.* [ed. 1850], 117; The William & Emmeline, 1 *Blatch. & How.*, 66; Jennings *a.* Ins. Co. of Penn., 4 *Binn.*, 224; 3 *Kent's Com.* [9th ed.], 459, 460, N.; 3 *W. & M.*, 336; 2 *Park. on Ins.*, 884; 8 *Jur.*, 716; 3 *Notes of Cases*, 180; 3 *Mason C. C.*, 341; The Nelson, 1 *Hagg.*, 179.

VII. The court erred in charging the jury that if Captain Munson employed the average-adjuster, and the general statement included the $1,710.24, and defendant claimed and received from the underwriters their proportion of the general average as adjusted, and plaintiffs had received $1,309.59, and no more, the plaintiffs are entitled to recover $552.18. The charge, to be correct, assumes, 1. That Munson was agent for defendant; 2. That the proportion of general average claimed and received was $1,710.24, when the proof was only of $1,291.37. 3. It is founded on a clear arithmetical error. 4. The implied assumption of the amount received by plaintiffs is not sustained by the proof.

Jeremiah Larocque, for the respondents.—I. No motion for a new trial having been made at the special term, the application on the case and exceptions cannot be entertained on this appeal, and the judgment must be affirmed. (*Code*, § 265.)

II. The whole case was properly left to the jury upon the evidence, under the instructions given to them. The $1,309.59, referred to in the charge as the amount collected, included the $151.53 of marine premium (specifically receipted for as such), leaving $1,158.06 collected on the $1,710.24, and a balance due of $552.18, besides interest.

III. The several instructions asked for by the defendant's counsel were properly refused, except the 7th, which was charged.

IV. The motion to dismiss the complaint was properly denied.

V. The several rulings on questions of evidence, to which exceptions were taken, were correct.

VI. The defence of sailing on shares, and that the captain, if any one, was therefore the person liable, and not the owner, was not set up in the answer; was sustained by no proof; and would have been unavailing if proved, as the debt was incurred for the benefit of the vessel's hull; was covered by insurance in favor of the owner, and not of the master; and the owner recognized his responsibility by collecting the general average for his own benefit.

By the Court.—Leonard, J.—The complaint claims to recover a balance of $552.18, part of the sum of 1,710.24, advanced by Fischer, Büssing & Co., at a foreign port, for the necessities, &c., of a vessel belonging to the defendant, on the request of the master, to enable the vessel to proceed to sea; which demand was by the foreign house assigned to the plaintiffs. The defence is payment, and a general denial of all the allegations of the complaint.

The first objection to the recovery is, that there is no evidence that Fischer, Büssing & Co., the plaintiffs' assignor, paid any greater sum than the amount of the draft for $1,010.24 for the necessities of the vessel; and if they did, that the additional amount was paid without any authority from the captain of the vessel, or any one else acting for the vessel or her owner, the defendant.

The answer to this objection is, that an average adjustment was made in New York of the loss or damages sustained by the vessel, arising from the injury out of which the necessity for the advances in question arose, and that the firm of Fischer, Büssing & Co. advanced the amount claimed by them at the foreign port. Evidence was given tending to prove that the whole amount of these advances was included in this adjustment as part of the loss or damages sustained, and that the defendant received payment of his loss, so far as he was insured, based upon this adjustment. The evidence was sufficient to support the verdict.

The defendant accepted payment of his loss to the amount insured, which was adjusted, on a statement of damages, including the whole amount of the advances, and exceeding the amount of the draft of $1,010.24, which he insisted at the trial was all which the plaintiffs' assignors had advanced for the

necessities of his vessel, and that there was an entire want of authority to advance any larger sum. The inclusion of this amount in the average adjustment, was an admission that the advances which were claimed to constitute the loss were made for the account of the vessel. The defendant could not claim the benefit of the advances, to enhance the amount of his recovery from the insurance companies, without being held to have admitted that the advances were actually made, and were authorized. If the advances were unauthorized, he had not sustained the amount of damages which he claimed.

The second objection raised by the defendant's points is equally untenable.

The bill of particulars contains the items of the claim for $1,710.24, and the complaint seeks to recover a balance thereof remaining unpaid.

The bottomry interest, $151.53, is not sought to be recovered here. That sum had been voluntarily paid long before suit. Nor does that sum constitute any part of the $1,710.24, as will be seen by reference to the bill of particulars, nor of the balance thereof remaining unpaid.

The sums which had been paid towards the items composing the sum of $1,710.24, were the draft, $1,010.24, and the sum of $147.82, paid by Captain Munson in New York, amounting together to $1,158.06, and leaving unpaid of the principal sum mentioned in the complaint just the balance of $552.18 here claimed.

The objection that the owner is relieved from liability because the master sailed the vessel on shares, is not well taken. The terms of the agreement under which the master sailed the vessel were not proven. The advances were for the preservation of the vessel, as well as for the advantage of the freight and cargo.

The authorities show a great many nice distinctions in respect to the liability of the owner or master for work and labor, materials, and goods, wares, &c., supplied to vessels under various conditions of the agreement entered into between the owner and the master in respect to sailing or running the vessel. They appear to turn, generally, upon the inquiry to whom the credit must be deemed to have been given, whether to the master or the owner.

The demand in suit arose from a liability of the vessel and cargo for salvage, which the assignors of the plaintiffs advanced to discharge the lien therefor, and to enable the vessel to proceed on her voyage. I think it entirely clear that no advances were made here upon the credit of the master.

The foregoing considerations embrace all the questions raised by the defendant on the motion to dismiss the complaint; and also the first, second, third, fourth, and eighth requests to charge, and the exception to the charge given to the jury on the request of the plaintiffs.

No question was raised by the defendant at the hearing of the appeal in respect to his other requests relating to the charge.

Several exceptions to the admission of evidence were taken by the defendant at the trial, as it appears by the case; but none of them were argued at the hearing, and further reference to them is therefore considered unnecessary.

It is proper to notice a point of practice raised by the plaintiffs. It was insisted by the counsel for the plaintiffs, at the hearing, that the judgment must be affirmed, because no motion for a new trial upon a case or exceptions had been made at the special term.

The action was tried by a jury. The appeal is from the judgment, and no motion having been made for a new trial at the special term, of course there is no appeal from an order refusing a new trial.

A motion for a new trial must be made, in the first instance, at special term or circuit, on a case or exceptions, when the action has been tried before a jury. (*Code*, § 265.) The terms "case" and "exceptions" had a well-defined, legal signification when the Code was framed, and were therein used in the same sense as they had been previously used. A motion for a new trial on a case, prior to the adoption of the Code, was an application to the equitable discretion of the court on the merits, as presented by the facts in proof; and was resorted to, generally, when the verdict was supposed to be against the weight of evidence, or the damages were excessive, &c., &c. A bill of exceptions was made when the defeated party wished to urge his strict legal right to a new trial for alleged errors committed in the course of the trial, to which the attention of the judge had been called by an objection, and an exception had been

taken to his ruling. Exceptions taken at the trial involve a legal right; and, if well taken, generally secure to the injured party a new trial.

The exception then, as now, raises a question of law. It sometimes occurred that a party who had failed to obtain a verdict desired to bring before the court exceptions taken at the trial, and also a review of the facts upon the merits, so as to urge that the verdict was against the weight of evidence, as well as to urge his right to a new trial on his exceptions. This was usually done by a bill of exceptions; and the application was made thereon for a new trial before the circuit judge as upon a case.

The same practice is preserved by section 265 of the Code; and if an appeal is taken from the decision of the judge, made either at the circuit or the special term, it must be taken under section 349 of the Code. That is, the *order* is appealed from because it grants or refuses a new trial.

A review upon the facts can be secured at the general term only in that way when there has been a trial by jury. An appeal under section 348 of the Code may be taken upon the *law* in all cases from a judgment entered under the direction of a single judge of the same court or a referee. No review of the facts can be had on such an appeal where there has been a jury-trial. And it would seem that no such review could be had under this section where the trial had been before a referee, except for the next paragraph, providing expressly for an appeal upon the fact when the trial is by the court or referees.

It is clear that an appeal lies upon the *law*, from a judgment, when there has been a trial before the judge at the circuit with a jury, as in the present case. Upon such an appeal, under section 348, there is no application to the equitable discretion of the court. The appeal must be considered upon the *law* only, arising upon such exceptions as were taken to errors committed during the trial.

The present is such an appeal; and the point raised by the plaintiffs' counsel is not, in my opinion, well taken.

Judgment must, however, be affirmed on this appeal, with costs, as we find no errors to have been committed.

Sutherland, P. J., concurred.

Barnard, J., expressed no opinion.

Hom. 465

RAWLS *a.* CARR.

Supreme Court, First District; General Term, Dec., 1863.

Place of Trial.

An action which involves the question whether a conveyance of land is fraudulent as against creditors is not necessarily local, within the meaning of section 123 of the Code of Procedure, so as to require the place of trial to be laid in the county where the land lies.

Appeal from an order denying a motion to change place of trial.

This action was brought by Henry Rawls and C. St. John Seymour against William W. Carr, Mary P. Carr, and said Mary as administratrix of Joseph C. Stone. The complaint set out that the plaintiffs were factors and agents of the late firm of J. C. Stone & Co., and claimed the discovery of the balance due plaintiffs upon their dealings with that firm, to have the accounts of plaintiffs with that firm stated, the balance due ascertained, and then to have the assets of the firm and its survivor, and of the administratrix of the deceased partner, marshalled, and applied in payment of the debt found due to plaintiffs. And it averred that among the assets applicable to the payment of the debt due to plaintiffs was a piece of land in Rochester, New York, with a dwelling-house upon it, and the furniture in the house; which, by reason of facts alleged in the complaint, were in law the property of the defendants, and ought to be applied to the payment of plaintiffs' demand. The place of trial named in the complaint was the city and county of New York. The defendants lived in Rochester. The defendants moved at chambers to have the place of trial changed to Monroe county, on the ground that the latter was the proper county. The convenience of witnesses was not alleged. The motion was denied, and defendants appealed.

Henry Nicoll, for the appellants.—I. The object of this action is to avoid a conveyance of lands and a dwelling-house thereon, in the county of Monroe, and household furniture and other personal property in said house, and to have the same applied in payment of the plaintiff's debt. It is, in fact, an action to determine the title of Mrs. Carr to real estate, in a formal proceeding in equity.

II. The language of the Code is clear and explicit: That where the action is for the determination, in any form, of a right or interest in real estate, it must be brought in the county where such real estate is situated. There is no ambiguity in this language, and there is no occasion to resort to extrinsic evidence to ascertain the meaning of the provision. (Wood *a.* Hollister, 3 *Abbotts' Pr.*, 14.)

III. There is no room for saying that the Legislature intended to confine the operation of this provision to such common-law actions as existed before the Code. Eight independent tribunals are established to administer both law and equity. It is not to be inferred that it meant to give these courts, necessarily local in their character, a more extensive jurisdiction than that enjoyed by the circuit judges and vice-chancellors under the former system. The motion, therefore, to adopt the provision which existed in reference to limiting the jurisdiction of these officers, is cogent evidence that the general provision of the Code (§ 123) was meant to apply to all cases.

IV. The cause of action in this case would not have been cognizable before a vice-chancellor, as it neither arose here, nor was the subject-matter situated here.

Lucien Birdseye, for the respondents.—I. It is submitted that the action is not local, and does not fall within the provisions of section 123. It clearly does not fall within subdivisions 2, 3, or 4 of that section. It is also not within subdivision 1. It cannot be claimed that the suit is made local because some of the assets to be marshalled are real estate. Nor is the suit (within subdivision 1 of section 123 of the Code) an action, 1, for the recovery of real property; or, 2, for the recovery of an estate, or interest therein. 3. It is not an action for injuries to real property. 4. It is not an action for the determination, in any form, of such right or interest. It is true it was held

(Wood *a.* Hollister, 3 *Abbotts' Pr.*, 14), that where the action is by the judgment-creditor solely, to set aside a conveyance as fraudulent and void there, the suit is local; but this case has been virtually reversed by a case at the general term, first district. So, if the bill is filed, as in Mairs *a.* Remsen (3 *Code R.*, 138), to have a deed, absolute and uniform, declared to be a trust-estate for the benefit of the plaintiff. But neither of these cases applies when the whole scope and object of the bill is the recovery of a debt, and the marshalling of the assets for the payment thereof. The case of the New York Ice Company *a.* the Northwestern Insurance Company (10 *Abbotts' Pr.*, 34) is in point.

II. The land is not the subject of the action, but the fraud in the conveyance from the debtor to the grantee.

Sutherland, P. J., and Barnard, J., concurred in affirming the order.

Leonard, J., dissenting.—This motion comes up on an appeal from an order denying a motion to change the place of trial.

It is insisted by the defendant, Mrs. Carr, that the action is local, within the meaning of section 123 of the Code of Procedure. The first subdivision of that section declares that the action must be tried in the county in which the subject of the action, or some part thereof, is situated, where (among other cases) it is for the determination, in any form, of a right or interest in real property.

The present action is brought to subject certain land at Rochester, which has been conveyed to Mrs. Carr, to the payment of a debt due to the plaintiffs, upon the ground that the deed to her was fraudulent and void as against the plaintiffs, who are creditors of her grantors. The place of trial named in the complaint is the city and county of New York.

It appears to me that an adjudication in this action, that the deed to Mrs. Carr is fraudulent and void as against the plaintiffs, will effectually determine all her interest in the real property in question.

It requires some special reasoning to avoid the direct force of the foregoing statement. I know of no decisions in this district

where such an action has been held not to be local. None have been reported.

There are at least three decisions at special term of this court which have been reported, holding such actions to be local. (Mairs *a.* Remsen, 3 *Code R.*, 138; Wood *a.* Hollister, 3 *Abbotts' Pr.*, 14; Starks *a.* Bates, 12 *How. Pr.*, 465.)

I am inclined to follow these authorities. The order must be reversed, and the place of trial changed to Monroe county, with $10 costs of the motion, and $10 costs of this appeal to the defendants, to be collected on final judgment.

Order affirmed, with costs.

VAN NEST *a.* TALMAGE.

Supreme Court, First District; General Term, Dec., 1863.

PAYMENT.—ACCORD AND SATISFACTION.—MATTER OF DEFENCE.—REPLY.—RECEIPT.—RELEASE.

Where a debtor and creditor have made an agreement reciting the payment of the debtor's obligation, except a specified sum, an action by the latter to recover that balance is properly brought upon the original obligation, not upon the subsequent agreement.

In an action of a nature which was formerly cognizable at law, the plaintiff is not required to anticipate and avoid matters of defence, and is at liberty to disprove or impeach them, although he has put in no reply.*

A receipt or release may be avoided by proof that it was obtained without consideration, or by misrepresentation, or that it has been rescinded by argument.

Appeal from a judgment.

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* *It seems*, however, that he is at liberty to anticipate a defence in some cases. In Wade *a.* Rusher (4 *Bosw.*, 537), it was held that in an action where the setting aside of a release or account stated is necessary to reach the relief sought, the complaint may, after stating the original cause of action, set forth the defence which it is anticipated defendant will interpose, with statements which avoid the defence. So in Thompson *a.* Minford (11 *How. Pr.*, 273), it was held that plaintiff may amend his complaint, in a proper case, by adding allegations necessary to show securities or evidences of debt, taken for the cause of action set out in the original complaint,—*e. g.*, a foreign judgment recovered upon it.

This action was brought by Abraham R. Van Nest, Jr., against Thomas G. Talmage, to recover $8,929.25 as balance due on two bonds given by defendant to Abraham R. Van Nest and assigned to plaintiff. The defence was payment, with accord and satisfaction. The cause was tried before Mr. Justice Clerke and a jury. The defendant obtained the affirmative of the issue, and proved the execution of an agreement of the parties, under seal, dated April 19th, 1845, in which plaintiff accepted certain real estate and securities in payment, "leaving a balance as from the first of May, 1845, A. D., of $3,352.20 secured," &c. Defendant also put in evidence a receipt, as follows: "New York, 23d October, 1846. Rec'd from Thomas G. Talmage, a deed for 640 acres of land in Johnson county, in the State of Illinois; 20 shares of the Exchange Hotel Company stock, of Richmond, Va.; and his note of hand for $200, in full payment of the within agreement; said Talmage agreeing to pay any taxes that may have been imposed on the lands in Illinois, up to and including the year 1845, if any remain unpaid up to that time. Abm. R. Van Nest, Jr." The plaintiff sought, upon various grounds, which sufficiently appear from the opinion, to avoid this receipt.

The defendant had judgment, from which the plaintiff appealed.

John J. Townsend, for the appellant.—I. To sustain the defence of payment, no evidence was offered. The defence of a parol accord, and satisfaction of the "bonds and obligations in the complaint mentioned," has never been recognized as valid. (Neal *a.* Sheaffield, *Cro. Jac.*, 254; Preston *a.* Christmas, 2 *Wils.*, 86; Anon., *Cro. Eliz.*, 46; Oliver *a.* Lease, *Cro. Car.*, 86; Kaye *a.* Waghorne, 1 *Taunt.*, 428; Strang *a.* Holmes, 7 *Cow.*, 224; Mitchell *a.* Hawley, 4 *Den.*, 414; Smith *a.* Trowsdale, 3 *El. & Bl.*, 83; Welch *a.* Lynch, 7 *Barb.*, 381.) The defendant has not alleged satisfaction of the condition. The allegation of parol satisfaction of the bond is no defence. (See Hill *a.* Stocking, 6 *Hill*, 277.)

II. No defence was proved to plaintiff's first cause of action. The general expression, that Latson's bond for $8,000 was taken in payment on account, could not, if considered without reference to extrinsic circumstances, outweigh the subsequent speci-

fic recognition of the debt. (See Tobey *a.* Barber, 5 *Johns.*, 68; Coonley *a.* Coonley, *Hill & D. Supp.*, 312; Johnson *a.* Weed, 9 *Johns.*, 310; Noel *a.* Murray, 13 *N. Y.*, 167.) Again: the expression has less weight; for the term payment does not imply "exchange or compromise, accord or satisfaction." (Manice *a.* Hudson River R. R. Co., 3 *Duer*, 426.) When the court refers to the extrinsic circumstances (see Blossom *a.* Griffin, 13 *N. Y.*, 569), it further appears that upon the construction claimed by the defendant the agreement was without consideration.

III. If it be the true construction of the agreement of April 19th, 1845, that the demand against the defendant, on the bond first mentioned in the complaint, was to be satisfied by the receipt of Latson's bond; it was without consideration, and void,—Latson having assumed the payment of the defendant's bond. (Del. & Hudson Canal Co. *a.* Westchester Co. Bank, 4 *Den.*, 97; Burr *a.* Beers, 24 *N. Y.*, 178; Lawrence *a.* Fox, 20 *Ib.*, 268.)

IV. There is no evidence of any satisfaction of the obligation set up as the second cause of action, or of the money due by the condition of it.

V. The paper dated 23d October, 1846, does not prove the receipt of the property referred to in it—so far as the deed of Illinois land is concerned, because it is incompetent evidence to prove the conveyance of land. (Fox *a.* Reil, 3 *Johns.*, 477; Welland Canal Co. *a.* Hathaway, 8 *Wend.*, 480.) And defendant's counsel disclaimed offering it with that view; and as the defendant offered no other evidence of the receipt of the property mentioned in this receipt, there is a failure of proof in this respect.

VI. Plaintiff's exception presents the question, whether it was competent for him to prove that the deed alleged to have been received by him October 23, 1846, was void. (1 *Rev. Stat.*, 70, § 65; Powers *a.* Bergen, 6 *N. Y.*, 358.) The consideration of a receipt is always open to explanation. (Houston *a.* Shindler, 11 *Barb.*, 36; Murray *a.* Gouveneur, 2 *Johns. Cas.*, 438.) A receipt, when set up as an item of evidence, is impeachable on any ground which would have been a good reply to it had it been set up in the answer as a bar to the action. (Graves *a.* Friend, 5 *Sandf.*, 568, 572; McCrea *a.* Purmort, 16 *Wend.*,

460, 473; Stafford *a.* Bacon, 1 *Hill*, 532; Carter *a.* Connell, 1 *Whart.*, 392.) The defendant could not convey trust property to the plaintiff in satisfaction of his private debt. (Briggs *a.* Palmer, 20 *Barb.*, 392, 404; Cruger *a.* Jones, 18 *Barb.*, 467.)

VII. The court erred in excluding evidence showing that defendant had no title to the Illinois land referred to in the receipt, and also evidence of misrepresentation and concealment: also evidence showing that the alleged settlement was rescinded. (Stafford *a.* Bacon, 1 *Hill*, 532; Carter *a.* Connell, 1 *Whart.*, 392.) Fraudulent misrepresentation or concealment, or mutual mistake, will invalidate an ordinary contract. (Belknap *a.* Sealey, 2 *Duer*, 570; 14 *N. Y.*, 143; Daniel *a.* Mitchell, 1 *Story*, 172.) In the case of the satisfaction of a precedent debt, a perfectly good understanding of the matter is essential to make it binding on the creditor and extinguish his original claims. (Galoupeau *a.* Ketchum, 3 *E. D. Smith*, 175.)

VIII. The formal recognition by the defendant of his indebtedness to the plaintiff on the bond, at least entitled him to prove, in connection with it, that the alleged satisfaction was both invalid in its inception and had also been abandoned.

Livingston K. Miller, for the respondent.—I. The property referred to in the agreement was taken in payment *pro tanto.* The bond was not cancelled in form, obviously because to do so might impair the mortgage that was collateral to it. It was only kept alive to keep alive the mortgage, but not as a valid debt against Talmage. It will be noted, that leaving Talmage out as a defendant was not an oversight. The plaintiff was earnestly requested by Latson to make him a party. (See Van Nest *a.* Latson, 19 *Barb.*, 604.) How can this be accounted for but from the fact that Van Nest then considered he had discharged Talmage?

II. 1. The alleged facts as to the trust character of the property, the false representations, and the rescission of the settlement, cannot be shown under the issue created by the pleadings, and the complaint is not founded upon the proper instrument. 2. That even if Talmage held title as trustee, not in his own right, his conveyance would be effectual as between himself and third parties, and only raise a question as between

himself and his *cestui qui trust.* 1 Rev. Stat., 730, § 66, expressly covers this case. 3. The plaintiff's offer to show title in Dr. Van Pelt, was inconsistent with his offer to show title in Talmage as trustee, and therefore inadmissible. 4. The offer was properly rejected, and the plaintiff limited to a contradiction of the receipt.

III. The main questions now before the court are, 1. Was the payment of the first and second mortgages, if they were paid, a payment of the collateral, or rather a reduction of it, *pro tanto*, leaving but $3,352.20 due? (See Champney *a.* Coope, 34 *Barb.*, 539; Mead *a.* York, 6 *N. Y.*, 449.) The authorities to sustain the claim of payment, where the agreement in terms recites payment, will be found in Noel *a.* Murray (13 *N. Y.*, 167). Talmage was discharged by not being made a party. A mortgage is the collateral for a bond. The bond is the evidence of debt. So soon as the bondsman or mortgagor ceases to be the owner of the mortgaged property, and it is sold to another who assumes the debt, the new purchaser becomes primarily liable for the debt as the chief debtor, and the original bondsman is but his surety. (Belmont *a.* Coman, 22 *N. Y.*, 440; Halsey *a.* Reed, 9 *Paige*, 446; Curtiss *a.* Tyler, *Ib.*, 432; Burr *a.* Beers, 24 *N. Y.*, 178. See Wheeler *a.* Newbould, 16 *Ib.*, 392; Stearns *a.* Marsh, 4 *Den.*, 227; 4 *Kent's Com.*, 196.) In order to prevent a multiplicity of suits, and to determine the rights of parties, the statute allows a judgment in foreclosure against the mortgagor for deficiency. Impliedly, the only way of obtaining judgment against a mortgagor is by making him a party to the foreclosure, thereby to charge him with the deficiency. It is grossly inequitable to allow a party to come into a court of equity, sell the collaterals without notice to the mortgagor, and then, having deprived him of the opportunity to protect himself at the sale, having taken his property, to bring an action on his bond for deficiency. A court of law will not uphold it in the case of a pledge, and it is not to be presumed that a court of equity will in case of a mortgage. 2. The remaining question is as to the proper exclusion, by the court, of any evidence going to show that the receipt was improperly obtained. The $3,352.20 remaining due, was due on the agreement, which was now a new contract defining the relations of the parties, and liquidating the indebtedness at $3,352.20 secured by said

collateral. This action could not be sustained on the bonds as such; the suit should have been on the agreement, charging the indebtedness of $3,352.20, and seeking to rescind the settlement had under it. But we need not rest the case here. No evidence as to the rescission of the contract was admissible without an offer to surrender the securities, note and stock, and reconvey the land. It was, therefore, properly excluded. (Baker *a.* Robbins, 2 *Den.*, 136; Fisher *a.* Conant, 3 *E. D. Smith*, 199; Voorhees *a.* Earl, 2 *Hill*, 288; Matteawan Co. *a.* Bentley, 13 *Barb.*, 641; Mumford *a.* Am. Life Ins. & Trust Co., 4 *N. Y.*, 463, 482; Hogan *a.* Weyer, 5 *Hill*, 389; Wheaton *a.* Baker, 14 *Barb.*, 594; Fisher *a.* Fredenhall, 21 *Ib.*, 82; Moyer *a.* Shoemaker, 5 *Ib.*, 319; Masson *a.* Bovet, 1 *Den.*, 69.) The decisions on these points are so numerous that I have only selected a few.

IV. Conceding that the evidence offered was improperly excluded, it is evident that on the whole case legal justice has been done the plaintiff, and therefore a new trial should be denied. (Cameron *a.* Irwin, 5 *Hill*, 272, 277.)

John J. Townsend, in reply.—I. If a new trial should be granted, and the respondent should be able to show that he has suffered any loss by reason of his not being impleaded in the foreclosure suit, or that he did not, *in fact*, have notice of it, or any similar fact, the respondent would then have an opportunity of raising any question he may think proper, predicated upon the facts he shall prove. For the purposes of this case, there can be no presumption that the respondent has sustained any injury by reason of his not being impleaded as a defendant in the foreclosure suit. In view of the fact that Latson, on the 28th day of March, 1844, purchased the mortgaged premises, and assumed the payment of $8,000, part of the said bond and mortgage, as a part of the consideration money, there is no difficulty or uncertainty in the construction of the agreement.

II. The agreement cancels the second bond and mortgage, reduces the first bond and mortgage to the precise sum assumed by Latson, and leaves Van Nest, the mortgagee *by express recognition*, his personal claim against Talmage; as between the debtors, their liability to the creditor being as follows: 1. The mortgaged premises; 2. Mr. Latson's personal obligation; 3.

Mr. Talmage's personal obligation. A satisfactory reason why Mr. Talmage was not impleaded in the foreclosure suit may be given, should it become necessary. There is no evidence of any refusal to include him in that action, and the supposition that he was omitted at his own request, is as probable as any other.

III. The effect of the receipt is not to vest, pass, or extinguish any right. It was merely offered on the trial as an item of evidence, to prove a state of facts which the defendant claimed amounted to an accord and satisfaction. Under these circumstances, the authorities are clear that it is not merely susceptible of contradiction or explanation, but is impeachable on any ground which would have been a good reply to it, had it been set up in the action as a bar to the action. (Graves *a.* Friend, 5 *Sandf.*, 568, 572; McCrea *a.* Purmort, 16 *Wend.*, 460, 473; Stafford *a.* Bacon, 1 *Hill*, 532; Dolsen *a.* Arnold, 10 *How. Pr.*, 528; Carter *a.* Connell, 1 *Whart.*, 392.)

Leonard, J.—The agreement of April 19th, 1845, was a full and valid discharge to the defendant from all personal liability to the plaintiff, on the obligation therein recited, except for the balance of $3,352.20, which was to be considered as the amount due May 1, 1845.

The transaction proven by the receipt of Oct. 23d, 1846, *prima facie* discharged that balance.

The plaintiff was correct in his practice by commencing his action upon the bonds of the defendants, and not upon the agreement of April 19th, 1845, or for the purpose of setting aside the receipt of Oct., 23d.

Under the system of pleading established by the Code of Procedure, no reply is required to an answer setting up payment, or accord and satisfaction, or any other matter, unless it constitutes a counter-claim.

Formerly, a reply would have been necessary to a plea of payment or of accord and satisfaction, setting up a denial or whatever matter existed which constituted an answer to the plea. But no system of pleading, either under the Code or before it, required a plaintiff, in a common-law action, to set up in his complaint any matter which the defendant might by possibility urge as an answer to the claim, or to show in the com-

plaint that any anticipated defence was not available to the defence. If a release or accord and satisfaction has been obtained by fraud, the plaintiff is under no obligation to anticipate, by his complaint, that the defendant will set up such a defence.

In the present case, the defendant knew of what the evidence consisted, to make out his defence; and he cannot pretend to be surprised, when he is required to be prepared at the trial with all the testimony necessary to maintain its validity, in case it should be assailed.

The judge erred at the trial, in excluding the evidence offered to prove that the transaction mentioned in the receipt of Oct. 23d, 1846, was fraudulent or void as against the plaintiff, or that it had been rescinded. It may be true, as the defendant insists, that the evidence offered would not amount to a full answer to his defence; but assuming the most favorable light of the case for him, the evidence must be admitted and considered, before its value can be ascertained. The evidence offered constituted a full answer to the defence arising out of the transaction of Oct. 23d, 1846, and the questions addressed to the defendant while on the stand as a witness ought to have been admitted. Should the plaintiff fail in establishing that he acquired no title to the land in Illinois from the defendant, or that the defendant, in fact, afterwards rescinded the alleged settlement, the defence would remain unimpaired; but the value of the evidence cannot be considered now, because the plaintiff has been deprived of an opportunity to bring it before the court.

There must be a new trial, with costs to the plaintiff, to abide the event, and the judgment now entered must be reversed.

Sutherland, P. J.—I concur in the result, that the judgment should be reversed and a new trial ordered.

Barnard, J.—I concur.

COWDREY *a.* CARPENTER.

New York Superior Court; General Term, November, 1863.

STAY OF PROCEEDINGS.—SUPPLEMENTARY PROCEEDINGS.

An appeal from a judgment, with the requisite security to effect a stay of proceedings, suspends proceedings supplementary to execution thereon; but the judge before whom such proceedings are pending has not power to dismiss them on that account.

If the judge could be deemed to have the power, its exercise would be inequitable. The creditor's lien is not taken away by the stay of proceedings, although its enforcement is delayed.

Appeal from an order dismissing proceedings supplementary to an execution.

The action was brought by N. A. Cowdrey against Jacob Carpenter. After judgment, the plaintiff obtained an order for the examination of a debtor to the defendant, supplemental to the execution. Pending the proceedings, and before any examination had taken place, the defendant appealed from the judgment to the general term of this court. He perfected his appeal by the usual notice, and gave an undertaking pursuant to sections 334 and 335 of the Code. The sureties upon the undertaking justified upon exception, and were approved by the judge.

Upon presentation of these facts, the judge dismissed the supplemental order.

F. N. Bangs, for the appellant.

A. R. Dyett, for the respondent.

BY THE COURT.*—MONELL, J.—The effect of the undertaking given upon the appeal from the judgment, was to stay all further proceedings upon the judgment appealed from. It therefore necessarily follows, I think, that all further proceedings

* Present, BOSWORTH, Ch. J., WHITE and MONELL, JJ.

upon the order supplemental to the execution issued and returned upon the judgment appealed from, were suspended. The examination of the judgment-debtor could not proceed, nor could any action whatever be had or step taken under the order. It is even doubtful if the judge could adjourn, and thus keep afloat the proceedings.

The question then arises, whether the judge had the power to, or could in the exercise of his discretion, dismiss the supplemental order.

These proceedings are not before the court, and never come before the court, in any of their original incidents. The order is granted by a "judge," the examination is had before a "judge," and all orders to carry into effect the results of the examination are made by a "judge;" and nothing connected with the proceeding, from first to last, comes before the court, except upon an appeal from some order made by the "judge." We think it cannot be doubted that the judge has the same general power over these proceedings that the court would have, if the authority to make the orders and conduct the examination had been conferred upon the court. He may dismiss the proceeding for want of jurisdiction, or for insufficiency or irregularity in the affidavit upon which the order was made; he may adjourn the matter from time to time; suspend the examination indefinitely; examine witnesses; admit or reject evidence; and punish parties and witnesses for disobedience of orders. His power, therefore, over the proceeding is absolute, and he is subject only to review by the court, on appeal from any of his orders.

But here, we think, the power of the judge ends, and he cannot ultimately dispose of the proceeding, to the prejudice of the creditor, by dismissing or annulling it against his objection.

The object of the examination is to reach the equitable interests and things in action of the judgment-debtor, which cannot be reached by execution upon the judgment. By the service of the order, and the restraint of the debtor, the creditor obtains an equitable lien upon such interests and things in action, which he has the right to retain as a security pending the suspension of his power to proceed on his judgment. Having acquired such lien previous to the appeal, he cannot, we think, in the absence of some express provision of law, be deprived of it.

The appeal suspends his right to obtain the benefit of his lien, but does not take it away.

We are not aware of any case where, after execution and levy under it, an appeal has been taken from the judgment, the court has set aside the execution and removed the levy. The levy is stayed, and the sheriff cannot proceed to sell. Nor could the lien of a judgment, upon the real property of the judgment-debtor, be removed by an appeal and security, until a recent special enactment, applicable to such a case. Before that law, the court were without power to relieve the property, be the security never so ample.

The cases of Parsons *a.* Travis (2 *Duer*, 659), and Spencer *a.* Rogers Locomotive Works (13 *Abbotts' Pr.*, 180), we think sustain this view.

If, however, the right to dismiss these proceedings rested in the discretion of the judge (although we think it does not), it would be an unsound exercise of such discretion to deprive the creditor of a security obtained through his equitable lien upon the debtor's property, by substituting for it the mere personal obligation of two sureties, who, although responsible now, may be utterly and hopelessly insolvent before the determination of the appeal.

Until the Legislature provides for the discharge of these proceedings, upon securing the judgment on appeal, as they have provided for relieving real property, it seems to us, independently of the want of power, that no other or greater effect should be given to the appeal from the judgment than is given by the Code; namely, to stay all further proceedings upon the judgment appealed from, and necessarily all further proceedings under the supplemental order.

We think the dismissal of the supplemental proceedings was erroneous, and the order appealed from should be reversed.

Order reversed.

SPENCER *a.* THE ROGERS LOCOMOTIVE WORKS.

New York Superior Court; General Term, November, 1861.

PLEADING.—ALLEGING JURISDICTIONAL FACTS.—DEMURRER.—ALLEGING NOTICE OF NON-PAYMENT OF NOTE.

In actions in local courts of general jurisdiction,—*e. g.*, the New York Superior Court,—it is unnecessary to allege in the complaint the facts, such as residence of the parties, which are necessary to the jurisdiction of the court over the person of the defendant.

A complaint in an action brought in the New York Superior Court against a foreign corporation, upon a note, which it alleges was in terms payable in the city of New York, states a cause of action within the jurisdiction of the court, even though the plaintiff be a non-resident.

In an action against an indorser of a note, an averment that "it was duly presented for payment at said bank" (where by its terms it was payable), "and payment refused, of which due notice was given to the defendant," is sufficient.

Demurrer to complaint.

The pleadings are sufficiently stated in the opinion of the court.

H. N. Beach, for appellant.

F. N. Bangs, for respondent.

BY THE COURT.*—WHITE, J.—The complaint in this case sets forth that the defendants were and are a body corporate, created by the laws of the State of New Jersey. That on October the 29th, 1860, the corporation called the Memphis and Charleston Rail Road Company made their promissory note, bearing date at Memphis on that day, for $3,344.77, payable to the order of the defendant, six months after date, at the Bank of America, in the city of New York, and delivered it to defendant, who indorsed it, and delivered it, so that it came to and is now held by the plaintiff; that it was duly presented for

* Present, BOSWORTH, Ch. J., WOODRUFF and WHITE, JJ.

payment at said bank at maturity, and payment refused, of which due notice was given to the defendant.

The defendant demurred to the complaint, upon the alleged grounds, that it appeared upon the face of the complaint—

1. That the court had no jurisdiction of the person of the defendant, or the subject of the action.

2. That the complaint does not state facts sufficient to constitute a cause of action.

The main error upon which this demurrer is founded, is the supposition that it is necessary in a complaint in this court to aver jurisdiction; that is, to aver facts independent of the cause of action, the existence of which is, in certain cases, necessary to confer jurisdiction—such as *the residence of the plaintiff*, in an action against a foreign corporation, when neither the cause of action has arisen, nor the subject of the action is situated within the State. But this is a mistake. Jurisdiction is presumed, unless it appears upon the face of the complaint that the court has not jurisdiction of the action: that is, in the case supposed, jurisdiction will be presumed, unless it should be averred, or made distinctly to appear in the complaint, that the plaintiff was a non-resident.

But even if the plaintiff were a non-resident in the case before us, I think that sufficient facts appear in the complaint to give the court jurisdiction. The action is upon a promissory note made payable at the Bank of America, in the city of New York. Upon the demand and non-payment, and notice to the indorser, a cause of action immediately arose and accrued to the holder in this city. (Bank of Commerce *a.* Rutland & Washington R. R. Co., 10 *How. Pr.*, 1; Burckle *a.* Eckhart, 3 *N. Y.*, 132; Cooper *a.* Earl of Waldegrave, 2 *Beav.*, 282; *Story's Confl. of L.*, §§ 281, 282.)

The averment of notice of non-payment and protest, which is supposed to be defective, and is relied upon in support of the second alleged ground of demurrer is, we think, sufficient.

The judgment must, therefore, be affirmed, with costs.

MATTER OF WOODBINE-STREET.

Supreme Court, Special Term, Westchester County, Feb., 1864.

CERTIORARI.—NOTICE.—SEVERAL WRITS.

A common-law certiorari, to review the proceedings of a board of officers or inferior tribunal, may be granted on an *ex-parte* application.

Several writs of certiorari may be issued in one case, where this is necessary in order to bring up the entire record.

Motion to set aside order granting certiorari.

In this matter, an order had been obtained *ex parte* at special term, in Kings county, in Jan., 1864, for the issue of two common-law writs of certiorari, one to the village of Yonkers, and one to the County Court of Westchester county, to review proceedings on the levying of an assessment for the opening of Woodbine-street. The assessment-roll was on the files of the village; the order confirming the assessment was on the file of the County Court.

A. H. Wallis, for the village, moved to vacate the order and set aside the writs on two grounds:

1. Because the order was granted without notice.
2. Because two writs were issued in one proceeding.

On the first point, he quoted Re Mount Morris Square, 2 *Hill*, 14; and People *a.* City of Rochester, 21 *Barb.*, 656.

F. N. Bangs, in opposition, referred, on the first point, to Gardner *a.* Commissioners of Warren, 10 *How. Pr.*, 181; and on the second, to Starr *a.* Trustees of Rochester, 6 *Wend.*, 564; and Fitch *a.* Commissioners of Kirkland, 22 *Ib.*, 132.

J. F. BARNARD, J., after deliberation, denied the motion, overruling both the grounds on which it was put, and holding that no notice was necessary, and that as many writs might issue as were requisite to bring up the entire record.

FOGAL *a.* PIRRO

New York Superior Court; Special Term, April, 1860.
Again at General Term, December, 1862.

PLEADING.—STATUTE OF LIMITATIONS.—FORECLOSURE.—PARTIES.—MORTGAGEE IN POSSESSION.—BILL TO REDEEM.—IMPROVEMENTS.—ACCOUNTING.—ANCIENT DEED.

The Statute of Limitations does not begin to run against the right of a remainderman to redeem real estate from the mortgagee in possession under the termor, until the determination of the precedent estate.

The title of the Revised Statutes, "Of the time of commencing suits in a court of equity" (2 *Rev. Stat.*, 301, §§ 49–53), superseded the whole doctrine of lapse of time, as previously applied in a court of equity, fixing a positive rule for equity suits, just as absolute and definite as the statutes had prescribed for suits at law.

In cases arising before, as well as since the Code, the defence of the Statute of Limitations can be interposed only by answer.

In pleading the Statute of Limitations in an action brought to obtain redemption of mortgaged premises, the essential features of the defence are, possession for over ten years without any payment on account of the mortgage, or any acknowledgment of the relation of mortgagor and mortgagee, or any payment of rents and profits, or accounting for them.

But, an answer averring a possession in the defendant and those under whom he claims for twenty years, adverse and hostile to the plaintiffs, and under a title vested in him, the defendant, or those through whom he is entitled, is sufficient.

A mortgagee in possession has the right to require full payment of the amount due, before he can be called upon to surrender the right or possession to any extent.

But in an action, by several plaintiffs, to obtain a redemption of premises from the mortgagee in possession, where the right of some of the plaintiffs is barred by the Statute of Limitations, the plaintiffs, not barred, are entitled to redeem their share of the land on payment of their proportion of the debt.

On a redemption, the mortgagee in possession, who knew of the existence of the mortgage, is not, as a general rule, entitled to an allowance for new erections and improvements upon the mortgaged premises. But this rule is subject to many exceptions.

Where the mortgagee in possession, who has in good faith disavowed the character of mortgagee, and claimed in hostility to such a character, is obliged to submit to a redemption, the general rule is, that the improvements must be paid for.

Principles of accounting between mortgagor and mortgagee in possession on a judgment for redemption of the mortgaged premises.

The mere production of an ancient deed by the party claiming under it, does not entitle him to read it in evidence without further proof.

As against an action of ejectment by the remainder-man, the Statute of Limitations does not begin to run in favor of a person in possession under the termor till the determination of the precedent estate.

I. *April*, 1860.—Trial by the court.

This action was brought by Catharine Fogal, Sophia Randall, Peter Provoost, Amanda Tyte, Charles M. Day, John Fogal, Alexander Tyte, and Colloon Randall, against Joseph Pirro, and John Raab, to redeem a certain lot in Essex-street, New York city, alleged, in the complaint, to belong in fee to the plaintiffs, from the operation of a certain mortgage, and to regain the premises.

The complaint alleged that on the 9th of November, 1804, Peter Colyer, of Kings county, was seized in fee and possessed of three lots of ground, in the city of New York, one of them being on Eagle-street; that he then made his will, whereby he gave to his three daughters, Eve, Margaret, and Catharine, each one lot of land, and died soon after without having revoked or altered such will, and leaving his said three daughters and other children, and his widow, him surviving, and that at the time of the testator's death each of his said three daughters was married;—Eve to John Provoost; Margaret to George Tiebout; and Catharine to John D. Provoost.

That by a deed dated May 10, 1805, made between Margaret Colyer, widow of Peter Colyer; Charles Colyer, and Catharine his wife; Jacobus Colyer, and Jane his wife; Peter Colyer, and Eve his wife; William Van Cott, and Jane his wife; John Provoost, and Eve his wife; George Tiebout, and Margaret his wife; and John D. Provoost, and Catharine his wife; reciting, among other things, that the said Charles, Jacobus, Peter, Jane, Eve, Margaret, and Catharine were the children, devisees, and heirs at law of Peter Colyer, deceased; that doubts had arisen respecting the construction of his will, and that the parties desired to carry the intention of the testator into effect; the said parties, other than John D. Provoost, and his wife Catharine, granted, bargained, and sold to the said Catharine, and to her heirs and assigns forever, the lot of ground in Essex-street, which was the subject of this action; and that the said

Catharine was and continued in possession of such lot up to her death in 1810.

That in June, 1809, John D. Provoost, and Catharine his wife, executed a mortgage to Ezekiel Bishop, covering the lot in Essex-street, and also a lot in Charlton-street, which belonged to John D. Provoost, to secure to Bishop the payment of $800, one year from the date of the mortgage.

That Catharine, the wife of John D. Provoost, died in February, 1810, leaving her husband, and her children, Margaret, Catharine, Eliza, Sophia, and Peter, surviving, and that Margaret, the widow of Peter Colyer, died in 1811.

That after the death of his wife, John D. Provoost continued to hold possession of the Essex-street lot until September, 1815.

That in July, 1815, a foreclosure suit was brought in chancery, upon the said mortgage, by Bishop against John D. Provoost as sole defendant, which resulted in a decree of foreclosure to satisfy the amount then due, with costs, amounting in all to $1,077.98; and that in September, 1815, the lot in Charlton-street was sold under the decree for $850, to James Stansberry, and the lot in Essex-street to Bishop, the mortgagee, for $750, who respectively paid their bids, and received deeds of conveyance in fee from the master. That in November, 1815, Bishop conveyed the Essex-street lot to John Ackley; in 1822 Ackley conveyed it to William Nelson, who died in possession; in 1850 the lot was sold under judgment, in a suit to which none of the plaintiffs in this action were parties, to John Raab, who received a deed of conveyance therefor, from the referee and Nelson's heirs, and entered into possession; and in August, 1856, Raab conveyed the premises to Pirro, the defendant in this action.

That John D. Provoost died in 1841. Margaret, daughter of Catharine Provoost, married E. Morgan, and in 1832 died without issue, and intestate. Eliza, another daughter, married Charles Day, and in 1838 died his widow, leaving two children—Charles M., one of the plaintiffs in this action, and Amanda, who married Alexander Tyte (and who was, with her husband, named as plaintiff). Catharine, daughter of Catharine Provoost, married John Fogal (both plaintiffs); Sophia, another daughter of Catharine Provoost, married Colloon Randall (also plaintiff); and that all the last-named persons, as well

as Peter Provoost, were still living. That the mortgage executed by John D. and Catharine Provoost to Bishop, if not satisfied by the decree, had been fully paid and satisfied; that the defendant had possession of the premises, claiming to be the owner in fee, and refused to surrender or to inform the plaintiff what, if any thing, was due upon the mortgage.

The plaintiffs demanded judgment, requiring the defendant to surrender the premises, *or* that an account be taken of the amount, if any thing, due upon the mortgage; and that on payment by the plaintiffs of that amount, the mortgage be declared satisfied, and the defendant be required to surrender.

The answer admitted the conveyance from Raab to the defendant Pirro; alleged that at the time of the commencement of this action the defendant had, and still had, a valid title to and was in possession of the premises, as owner in fee; that the defendant, his predecessors and grantors, have held and possessed the premises adversely to the pretended title of the plaintiffs for more than twenty years prior to the commencement of the action; and that neither the plaintiffs nor their ancestors had been seized or possessed of the premises within that period; and denied every thing in the complaint not admitted in such answer.

Upon the trial in March, 1860, the plaintiffs proved the title in fee to have been in Peter Colyer, by a conveyance made to him in 1784. They then read in evidence the will of Peter Colyer, mentioned in the complaint, dated November 9th, 1804. The devise to the plaintiff's ancestor, Catharine Provoost, is in the following words: "Item—I give and bequeath to my daughters Eve, Margaret, and Catharine, each one lot of land, lying in the city of New York, situated one in Eagle-street, two in Essex-street."

The plaintiffs then offered in evidence, *as an ancient deed*, without further proof, a paper purporting, in the body of the instrument, to be a deed executed by the widow and children of Peter Colyer, dated May 10, 1805, which was objected to by the defendant, admitted, and exception taken.

They also proved the mortgage executed by Provoost and wife to Bishop, in 1809, with the decree and sale on foreclosure, in 1815, as stated in the complaint; that the complainant received the full amount of his decree, including costs, out of the

proceeds of the sale; and that the remainder of such proceeds, being $511.94, was paid over to John D. Provoost, the defendant in such foreclosure suit. Also, that John D. Provoost died in 1841, leaving five children—of whom Sophia and Catharine were married before their father's death, and, with their husbands, were still living. Eliza married Charles Day, and survived her husband (who died in 1838) some years, and died leaving two children, Charles Day and Amanda Tyte. Margaret died in 1832, leaving no issue; and her husband, since deceased; and Peter was yet living.

Catharine Fogal, one of the plaintiffs, and wife of another plaintiff, was then offered as a witness by the plaintiffs; the defendant's counsel objecting, on the ground that she was the wife of one of the plaintiffs. The objection was overruled, and the court directed that the witness be sworn on behalf of the plaintiffs, other than herself and her husband; the defendant's counsel excepting. In giving her testimony, after stating that she was the daughter of John D. Provoost, and giving some detail of marriages and deaths in the family, she said: "I recollect that my mother had a lot in Essex-street. I have been on the lot in Essex-street as long as I remember; and during the life of my Aunt Tiebout, she had possession of it; my mother granted her the use. I know that lot; I played on it." Upon her cross-examination, she said: "My mother is dead ever since I was ten years of age; my father was living when I played on the lot in Essex-street; nobody lived there in 1837; it was vacant; there was no house on it as long as my mother lived; there were two lots in Essex-street that we played on." No further evidence was given by this witness, or any other, touching the possession of the property by Catharine, or her husband.

Colloon Randall, one of the plaintiffs, and husband of another, was also offered as a witness, sworn in the same manner, and testified as to marriages and deaths in the family, under like objections and exceptions.

The plaintiff then rested, when the defendant's counsel moved to dismiss the complaint; which motion was overruled, and exception taken.

The defendants proved the conveyances to Raab in 1850; that he then entered into possession, erected buildings, received

rents, &c.; and also his deed to Pirro, and the entry of the latter in 1856; and the case was then argued and submitted.

The judge, in a written opinion, decided that the plaintiffs, Fogal and Randall, were entitled to redeem the whole or a portion of the mortgaged premises, and by an order of court sent the cause to a referee, to take and state an account, showing the amount due upon the mortgage, assuming that $227 was due in 1815, and computing interest after August 1841 (the date of the death of John D. Provoost), and also the amount paid by Bishop, and the several persons holding under him for improvement, taxes, and assessments; and the amount of the rents and profits received, or which, by due care and diligence, might have been received by them,—and to report: to which order the defendant excepted.

The referee reported in detail, showing (with corrections made by the court) the amount due against the mortgagors to be $5,534.07; which was excepted to by the defendants.

Upon the coming in of the report, the cause was now again brought on to be heard on the pleadings, proofs, and referee's report.

John Townshend, for the plaintiffs.

Charles C. Egan, for the defendant Pirro.

Hoffman, J.—The property of which redemption is sought, belonged originally to Peter Colyer, of whom Catharine, wife of John D. Provoost, was a daughter. I think I am warranted in concluding, that under the will and under the deed of the 10th of May, 1805, this property vested in Catharine.

She united with her husband in the mortgage. The bond was given by him.

When the foreclosure took place in 1815 she was dead, leaving several children.

John D. Provoost, the husband, being made a party, and the only party to the foreclosure, all his right passed to Bishop the purchaser, as if he had executed a conveyance to him.

The consequence is, that the right of possession and of the pernancy of the rents and profits vested in Bishop, until the death of Provoost, in 1841.

Hence the children could not have brought an action of eject-

ment for the possession, during their father's life. (Jackson *a.* Schoonmaker, 4 *Johns.*, 390; Jackson *a.* Minkler, 10 *Ib.*, 480; Adair *a.* Lott, 3 *Hill*, 182.) Where the wife became entitled to the premises as heir at law, during coverture, and the husband conveyed his life estate therein, and his grantee continued in possession for more than thirty years, the husband still living, she may, after the decease of her husband, make an entry and recover the land. (Mellus *a.* Snowman, 8 *Shipl.*, 201.)

It appeared to me, at the trial, to be equally clear that equity in this case followed the law, and that a bill to redeem could not be brought by the children of Catharine, entitled in remainder, until the death of the father.

But upon examining the authorities, this is by no means clear. At any rate, there is a distinction of no little moment.

I refer to the case of Raffety *a.* King (1 *Keen*, 601), in which all the previous cases are carefully examined by the Master of the Rolls. There a piece of land was vested, by devise of her husband, in Mary, wife of John Dean, for her natural life or widowhood; and upon her death or marriage, in Vesey Raffety and his heirs, in trust, to sell and apply the proceeds among the testator's children. The property was subject to a mortgage term; and after the testator's death, the widow and trustee united in conveying the land in fee to the mortgagee, for the mortgage debt, and a further sum of money. Manning, the mortgagee, then entered upon the land in 1796, and he and persons under him had continued in possession until the commencement of the suit. Mary, the widow, died in 1832. Before 1836, the children of the testator filed a bill to declare the mortgage discharged, and have a reconveyance; or to redeem, if the mortgage was a subsisting charge. It had been assigned to a trustee to attend the inheritance, at the time of the conveyance, in 1796.

It was held, that when a mortgagee enters in possession in his character of mortgagee alone, or by virtue of his mortgage alone, he is for the period of twenty years liable to account, and is a trustee for the mortgagor; but if the mortgagor permits the mortgagee to hold for twenty years, he loses his right of redemption, and the title of the mortgagee becomes absolute in equity. In such a case, the time runs against the mortgagor from the moment of taking possession by the mortgagee; and contin-

ues to run against all those claiming under the mortgagor, whatever may be the disabilities to which they may be subjected.

But if the mortgagee enters, not in his character or in his right of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor, and to the validity of the conveyance he takes; and if the conveyance be such as, in law or in equity, only gives for his benefit the estate of a tenant for life, he must take that estate subject to the duties which are attached to it in the relation which subsists between the tenant for life and the remainder-man.

One of those duties is to keep down the interest of the mortgage; and having united in himself the two characters of mortgagor and mortgagee, he must, in the language of Chief Baron MACDONALD, 'be considered to have supported the rights and discharged the duties of each.'

"He owes a duty quite distinct from that which belongs to him in the mere character of mortgagee. So it was held in Corbett *a.* Barker, and Reeve *a.* Hicks; and in the judgment upon the plea in Ravald *a.* Russell, the mortgagee being purchaser of the equity of redemption, and having taken insufficient conveyances, obtained the husband's interest, and nothing more. The length of possession did not avail him.

"The argument on which it is contended that time ought to run against the remainder-man in all cases, is, that as the remainder-man may redeem, he ought to be barred if he neglects to do so; and, speaking generally, it is clear that the remainder-man has an interest which, as against the mortgagee, entitles him to redeem. But if the mortgagee purchases the interest of the tenant for life, it is by no means so clear that he can redeem.

"Samuel Manning having entered as purchaser, and having, during the life of John Dean, united in himself the character of mortgagor and mortgagee, I think that during the continuance of that life, time did not run against the persons interested in remainder."

The case of Ravald *a.* Russell (1 *Younge*, 19), is scarcely distinguished from the one before me, and the plea of the Statute of Limitations was there overruled; and Corbett *a.* Barker (3 *Anst.*, 755), as ultimately determined, is decisive.

The right of action then did not accrue until the death of John D. Provoost, in August, 1841.

At that time, his children, and the children of Catharine living, were the plaintiffs; Catharine Fogal then married to John Fogal, and her husband still living; Margaret, who died in 1832 without children, and married to one E. Morgan, the plaintiff. Sophia then married Colloon Randall, who is still living, and party to this action; Eliza then married Charles M. Day, and who died in 1845 or 1846, leaving the plaintiffs Charles M. Day and Amanda Tyte, her children and heirs at law, her husband being also dead; and the plaintiff Peter. Amanda was married in 1844 or 1845.

The present action was commenced in December, 1858.

The plaintiffs, Catharine Fogal and Sophia Randall, being under disability at the time of the right accruing, and so remaining when it was commenced, would not have been debarred by the Statute of Limitations, had that been properly set up in the pleadings. The act (2 *Rev. Stat.*, 301, §§ 52, 53) would govern the case. (*Code*, § 73.) They would have ten years, after disability removed, to sue.

But as to Peter, and the children of Eliza Day, the statute would, I apprehend, have been a bar.

But the Statute of Limitations is not, in terms, set up in the answer. I am inclined to think that the decision in Lefferts *a.* Hollister (10 *How. Pr.*, 383) is correct, and that the last clause of the 74th section of the Code applies to cases in which the cause of action arose before its adoption.

But if this is not so, it was always a rule that the Statute of Limitations must be set up by demurrer, plea, or answer. (Humbert *a.* Trinity Church, 24 *Wend.*, 58; Sears *a.* Shafer, 6 *N. Y.* (2 *Seld.*), 268; Fyson *a.* Pole, 3 *Younge & Coll.*, 266; Harrison *a.* Borwell, 10 *Sim.*, 382; Crutcher *a.* Trabue, 5 *Dana*, 82; Dorsey *a.* Dorsey, 6 *Gill & J.*, 12.)

It is insisted, on behalf of the defendant, that the statute is sufficiently set up—that the defence may be taken advantage of under the averments of the answer.

That is a question which deserves more argument and consideration than it has yet received. I do not find it necessary now to determine it, because I am clearly of opinion that a redemption in favor of some must be adjudged, and hence the account must be taken.

There are two views of importance and some nicety.

1. Either the plaintiffs Fogal and Randall redeem in full, paying off the whole debt on the mortgage and obtain possession, when the claims of the others will be adjuged in another action between them; or, 2. For the benefit of the defendant, there is a partial redemption for the interests of the two parties named, the defendant standing in the place of the plaintiffs barred. I have looked into the subject enough to see that these questions are of moment and nicety. (See Bell *a.* Mayor, &c., of N. Y., 10 *Paige*, 49, 71.) Certainly the defendant may require that it be not partially, but all redeemed.* When the account is taken, they can be passed upon.

I consider that there must be a redemption, complete or partial, because I am prepared, in any event, to adopt the rule laid down in Wade *a.* Johnson (5 *Humph.*, 117), that "where a tract of land belonging to tenants in common had been adversely held for a period fixed by the Statute of Limitations, and some of the tenants have been of age during that time, and others not, the interest of each tenant is barred, or otherwise, as he may be within or without the saving of the statute.

II. *December*, 1862.—Under the foregoing opinion and decision, judgment was entered, dismissing the complaint as to the plaintiffs, Peter Provoost, Amanda Tyte, Charles M. Day, and Alexander Tyte (upon the ground that they were barred by the Statute of Limitations), directing that Catharine Fogal and Sophia Randall pay to the defendants, within three months, $2,767.03, being one-half the amount found due upon the computation of the referee, as corrected; and that upon such payment being made, the defendant execute and deliver to them his deed, conveying to them one undivided moiety of the premises, and directing that the complaint be dismissed as to those plaintiffs, in case they should fail to pay within the time limited. The defendant excepted to some of the findings of facts and conclusions of law filed by the judge, and appealed to the general term. The plaintiffs, Peter Provoost, Charles M. Day, Amanda Tyte, and Alexander Tyte, excepted to so

* Compare Bogert *a.* Coburn, 27 *Barb.*, 230.

much of the judgment as dismissed the complaint as to them, but did not appeal.

Charles C. Egan, for the appellant.—I. The complaint should have been dismissed. 1. It did not state facts sufficient to constitute a cause of action. (Dunlap *a.* Gibbs, 4 *Yerg.*, 94; Hoare *a.* Peck, 6 *Sim.*, 51; Cuthbert *a.* Creasy, 4 *Bligh.*, *O. S.*, 125; Wienes *a.* Ogden, 4 *Wash. C. C.*, 631; Fyson *a.* Pole, 3 *Younge & Coll.*, 266; *Story's Eq. Pl.*, 484, 503, 529; 3 *Rev. Stat.*, 5 ed., 503, § 78; Humbert *a.* Trinity Church, 7 *Paige*, 195; 3 *Atk.*, 313; Jenner *a.* Tracy, 3 *P. Wms.*, 287, *n.* B; Beekman *a.* Frost, 18 *Johns.*, 544, 560, per SPENCER, J.; Giles *a.* Baremore, 5 *Johns. Ch.*, 545, 553; Kidd *a.* Cheyne, 18 *Jur.*, 348; *Story's Eq. Pl.*, § 426; 1 *Story's Eq. Jur.*, 365, and *n.*) 2. The whole of the premises were claimed by all, and three could under no circumstances recover. (Cole *a.* Irvine, 6 *Hill*, 634; Gillett *a.* Stanley, 1 *Ib.*, 121; Miller *a.* McCan, 7 *Paige*, 451; *Adams' Eq.*, 3 Am. ed., 674; *Story's Eq. Pl.*, 3 ed., § 185; 1 *Story's Eq. Jur.*, §§ 484, 490; Henly *a.* Stone, 3 *Beav.*, 355.) 3. No disabilities were alleged, and on the face of the complaint the rights of all the plaintiffs were gone by lapse of time. (Beekman *a.* Frost, 18 *Johns.*, 544, 560; Giles *a.* Baremore, 5 *Johns. Ch.*, 545, 553; 3 *Atk.*, 313; 3 *P. Wms.*, 287, *n.* B.)

II. Catharine Provoost was not shown to have been seized in fee of the premises at her death. 1. The pretended will was improperly admitted. (Jackson *a.* Luquere, 5 *Cow.*, 221.) But it gave her only a life estate. (Harvey *a.* Olmsted, 1 *N. Y.* (1 *Comst.*), 483; Olmstead *a.* Olmstead, 4 *Ib.*, 56; Edwards *a.* Bishop, *Ib.*, 61; Mesick *a.* New, 7 *N. Y.* (3 *Seld.*), 163.) 2. The unrecorded deed was improperly received in evidence as an ancient deed. (1 *Greenl. Ev.*, 9 ed., 28, § 21; 1 *Ib.*, § 144; citing Jackson *a.* Luquere, 5 *Cow.*, 221; Jackson *a.* Lamb, 7 *Ib.*, 431; Wilson *a.* Betts, 4 *Den.*, 201; Hewlett *a.* Cock, 7 *Wend.*, 371; 1 *Greenl.*, § 510, *n.* 2.) 3. It was not executed by four of the parties in interest and referred to, nor acknowledged by any, and, therefore, could not pass a title to the estate of a *feme covert.* 4. There was no evidence that the parties executing it were the children of Peter Colyer. (Jackson *a.* Browner, 18 *Johns.*, 37; Stokes *a.* Dawes, 4 *Mason*, 268; Jackson *a.* Russell, 4 *Wend.*, 543; S. C., in error, *sub nom.* Russell *a.* Jackson, 22 *Ib.*, 277;

Carver *a.* Jackson, 4 *Pet.*, 83; Schermerhorn *a.* Negus, 2 *Hill*, 335.) 5. The deed, if it conveyed any thing to Catharine Provoost, gave her but five-sevenths. 6. Catharine Fogal was an incompetent witness. (1 *Greenl. Ev.*, 9 ed., 481, §§ 334, 335; Hasbrouck *a.* Vandervoort, 9 *N. Y.* (5 *Seld.*), 153.)

III. Upon condition broken, the legal title to the estate became absolute in Bishop; and he could have obtained possession without even notice to the plaintiffs, either by ejectment or advertisement. (1 *Rev. L. of* 1813, 373, ch. 32, §§ 5, 10; Phyfe *a.* Riley, 15 *Wend.*, 248.) The sale under decree of foreclosure in equity, was equivalent to sale under the power by advertisement. (See Doolittle *a.* Lewis, 7 *Johns. Ch.*, 45; Slee *a.* Manhattan Co., 1 *Paige*, 48, per WALWORTH, Chancellor; *Laws of* 1842, 365, ch. 277, § 8.)

IV. In the absence of proof of title in Catharine, as well as to quiet the title, the court will presume that he was seized in fee by deed or otherwise. (1 *Greenl. Ev.*, 9 ed., §§ 16, 17; Ricard *a.* Williams, 7 *Wheat.*, 109; Brattle-street Church *a.* Bullard, 2 *Metc.*, 363.) Possession less than twenty years, coupled with circumstances indicative of ownership, has been held sufficient for the presumption of a grant. (Sumner *a.* Child, 2 *Conn.*, 607, 628, 632; Clark *a.* Faunce, 4 *Pick.*, 245.)

V. Provoost never had an estate, as tenant, by the courtesy in these premises. The will gave but a life estate to Catharine Provoost. There was no proof that she was an heir of Colyer, or that she was married to Provoost. Nor that the plaintiffs were the heritable issue of John D. and Catharine Provoost. Nor that there was seizin in fact, or possession in her before her death. (2 *Black.*, 126; 1 *Rop.*, 4; 4 *Kent.*, 28, 30; Doe *a.* Hutton, 3 *Bos. & Pul.*, 643; 1 *Rop.*, 9; *Perk.*, § 453; *Co. Litt.*, 29.)

VI. Whatever estate Provoost had, yielded to and was merged in the greater, the legal estate, held by Bishop the mortgagee, on condition broken. (4 *Kent.*, 45; Cooper *a.* Whitney, 3 *Hill*, 95; Chesterman *a.* Gardner, 5 *Johns. Ch.*, 29; *Story's Eq. Jur.*, 697, § 629; Power *a.* Lester, 23 *N. Y.*, 527.) But the conveyance, if it did not operate by way of release or extinguishment, certainly did by way of forfeiture. (*Co. Litt.*, 251, a b, 302, b; 2 *Inst.*, 309; 4 *Kent*, 34, 35; Cooper *a.* Whitney, 3 *Hill*, 95; Packer *a.* Rochester & Syracuse R. R. Co., 17

N. Y., 283.) No entry by him, after her death, could avail him to create or revive a tenancy. (1 *Rop.*, 9; *Perk.*, § 453; *Co. Litt.*, 29.) The recovery in the foreclosure suit, even if defective as to plaintiffs, defeated the tenancy; and such recovery never having been removed or set aside, no tenancy thereafter existed. (1 *Rop.* 42, *and note; Perk.*, § 475; 3 *Rev. Stat.*, 5 ed., 28, §§ 151, 152; Adair *a.* Lott, 3 *Hill*, 182.)

VII. If the mortgage by Provoost and wife was intended to pay his debt, then it was a disposition of her inheritance or estate absolutely (on non-payment), subject to no after reckoning or claim of her. (1 *Rop.*, 138; 3 *Brown C. C.*, 213; Neimcewicz *a.* Gahn, 3 *Paige*, 619.)

VIII. Plaintiffs in foreclosure, lose rights by lapse of time. (Anon., 3 *Atk.*, 313; Jenner *a.* Tracy, 3 *P. Wms.*, 287, *note B;* Doe *a.* Jesson, 6 *East.*, 80, *and note*, quoting stat. 21; *Jac.*, 1, ch. 16, § 1; 1 *Rev. L. of* 1813, 185, 186, ch. 183, § 3; Jackson *a.* Schoonmaker, 4 *Johns.*, 390; Beekman *a.* Frost, 18 *Ib.*, 544, 560.)

IX. An adverse possession commenced in 1815 (see Clapp *a.* Bromagham, 9 *Cow.*, 530), and ripened into a right of possession in twenty years; and ten years thereafter (allowed for the disability of infancy), tolled the right of entry of the plaintiffs. (1 *Rev. L. of* 1813, 185, 186; 4 *Johns.*, 390; 3 *Cruise's Dig.*, 368, tit. 29, ch. 1, § 3; Taylor *a.* Horde, 1 *Burr.*, 119; 2 *Salk.*, 421; *Ld. Raym.*, 741; Smith *a.* Burtis, 9 *Johns.*, 174; Smith *a.* Lorillard, 10 *Ib.*, 339, 356, per Kent, C. J.; Jackson *a.* Ellis, 13 *Ib.*, 118; Jackson *a.* Wheat, 18 *Ib.*, 40.) The statute bar applies as well to actions in equity as at law. (Humbert *a.* Trinity Church, 24 *Wend.*, 587, 607.)

X. The right to redeem is maintained upon the disability of marriage existing, not in 1815, but in 1841. This would be tacking a disability upon a disability, in violation of the statute. When the statute has commenced to run against the ancestor or other person, under whom the plaintiffs claim, it continues to run notwithstanding any disability that may accrue. (Demarest *a.* Wynkoop, 3 *Johns. Ch.*, 129, 138; Fleming *a.* Griswold, 3 *Hill*, 85.) The statute begins to run when possession is taken from the mortgagor, which, in this case, was in 1815. (Jackson *a.* Wheat, 18 *Johns.*, 40; Demarest *a.* Wynkoop, 3 *Johns. Ch.*, 129, 138; Doe *a.* Jesson, 6 *East.*, 80;

Jackson *a.* Johnson, 5 *Cow.*, 74; Cholmondeley *a.* Clinton, 4 *Bligh, O. S.*, 1. Tenancy of Provoost existed at best only as to the surplus which was paid into court, which the heirs could not be delayed in securing, except the interest on such surplus for life. (Cunningham *a.* Knight, 1 *Barb.*, 399; Jackson *a.* De Witt, 6 *Cow.*, 316; 3 *Rev. Stat.*, 5 ed., 33, §§ 6, 24; *Ib.*, 43, § 20; Blydenburgh *a.* Northrup and others, 13 *How. Pr.*, 289, 295.) Provoost will be regarded in equity as guardian for plaintiffs, and liable to account as such for the surplus. (Van Epps *a.* Van Deusen, 4 *Paige*, 64.)

XI. The assumption that $227 is due on the mortgage is against the allegations in the complaint, as well as the evidence, makes the defendant a trustee of the legal estate for the benefit of the plaintiffs, which, by our law in the case of a paid mortgage, he cannot be deemed. (Jackson *a.* Crafts, 18 *Johns.*, 110, 114.) The parties seeking redemption must redeem both pieces of land. (1 *Story's Eq. Jur.*, 365; 2 *Ves., Jr.*, 376; 2 *Fonb. Eq.*, b. 2, ch. 3, § 9, *n.*) If the plaintiffs are permitted to redeem, the sum of $750.00, with interest, must be paid. (2 *Fonb. Eq.*, b. 3, ch. 1, § 13; Adams *a.* Brown, 7 *Cush.*, 220; *Adams' Eq.*, 9 ed., 315; Balch *a.* Onion, 4 *Cush.*, 559; Parkist *a.* Alexander, 1 *Johns. Ch.*, 394; 3 *P. Wms.*, 131, *n.*; 1 *Story's Eq. Jur.*, 469, § 439.)

XII. Ackley and the subsequent grantees, *bona-fide* purchasers, cannot be defeated by the unrecorded deed. (4 *Kent's Com.*, 93; Dickerson *a.* Tillinghast, 4 *Paige*, 215; *Story's Eq. Jur.*, 440, 699, §§ 411, 631.)

XIII. The decree is founded upon proof of disabilities and other matters not charged in the complaint. (Kelsey *a.* Western, 2 *N. Y.* (2 *Comst.*), 500.)

John Townshend, for the respondents.—I. The decree below is too favorable to the appellant; it ought to have declared the mortgage satisfied by the sale in 1815, and that all the plaintiffs were entitled to recover possession of the premises, as in ejectment, and without payment for improvements.

II. The cause of action did not arise until the death of John D. Provoost, in 1841. The question is not whether a remainder-man may redeem, but whether he must redeem, pending a life estate. Pending the life estate, there could be no adverse

holding, as to those in remainder. There can be no cause to redeem (cause of action) until the right is expressly or impliedly disavowed. A redemption by those in remainder would have enured entirely to the benefit of the tenant for life.

III. The exceptions to the witnesses, Catharine Fogal and Colloon Randall, were too broad. (Brown *a.* Richardson, 20 *N. Y.*, 472.) Besides, it seems as if the witnesses might have been examined generally. (Marsh *a.* Potter, 30 *Barb.*, 506; Babbott *a.* Thomas, 31 *Ib.*, 277; Shoemaker *a.* McKee, 19 *How. Pr.*, 86; Barton *a.* Gledhill, 12 *Abbott's Pr.*, 246.) The case of Hasbrouck *a.* Vandervoort (9 *N. Y.* (5 *Seld.*), 153), does not apply.

IV. The unrecorded deed of 1805 was properly admitted, as an ancient deed. (Troup *a.* Hurlbut, 10 *Barb.*, 354; Staring *a.* Bowen, 6 *Ib.*, 109; Clark *a.* Owens, 18 *N. Y.*, 434.)

V. Most of the exceptions arising on questions to the witnesses are rendered immaterial by the decree being adverse to the plaintiffs, Provoost, Tyte, and Day. (Walker *a.* Dunspaugh, 20 *N. Y.*, 170.)

VI. The facts found at special term will be received as the facts in the case, and are not the subject of exception and review thereupon.

Bosworth, Ch., J.—The deed of May 10th, 1807, was admitted in evidence without any proof beyond the production of the paper. There was no other evidence of its prior existence; none as to its custody, or where it came from when produced at the trial; and of course no evidence that the plaintiffs, or either of them, ever had possession of the premises in question under it. This decision is clearly erroneous. (Wilson *a.* Betts, 4 *Den.*, 201; Clark *a.* Owens, 18 *N. Y.*, 434.)

The questions, "When did plaintiffs' right of action accrue?" and, "When did the Statute of Limitations begin to run?" are not free from difficulty.

When Catharine and John Fogal were married is not stated in the findings of facts, nor is it stated in them when Sophia and Colloon Randall were married.

The findings of facts do not state that Ezekiel Bishop claimed to own in fee, although they state that he conveyed in fee to John Ackley, on the 25th of November, 1815 (having bought

the premises on the 4th of September, 1815): they do not state that Ackley was even in the actual possession of the lot.

They state that Ackley and wife conveyed in fee, on the 8th of November, 1822, to William Nelson, "who held same during his life in fee; and after his death, his heirs or devisees held said lot, claiming said lot in fee, until the 22d of January, 1850."

Whether the plaintiffs, Catharine and Sophia, were, or whether either of them was, married prior to November 8th, 1822, the date of the conveyance to Nelson, does not affirmatively appear; nor do I deem it important to ascertain.

The foreclosure and sale in chancery did not affect their title as heirs of their mother. She had died before that suit was brought, and they were not parties to it.

If the mortgage was satisfied by the sale in chancery, so that their estate ceased to be incumbered by the mortgage, the Statute of Limitations, as against an action of ejectment, would not begin to run until the death of the tenant by the curtesy. If the mortgage is to be treated as satisfied, then legal title is clear—and the statute is no bar, they being, at the time of the death of the tenant by the curtesy, under the disability of coverture, and that liability being still continuing. (Jackson *a.* Johnson, 5 *Cow.*, 74, 94, 102; The Same *a.* Schoonmaker, 4 *Johns.*, 390; Casborne *a.* Scarfe, 1 *Atk.*, 605.)

They had no right of entry nor any right of possession during the existence of the estate by the curtesy; and during the continuance of that estate, their right as heirs of their mother could not be defeated by a claim of adverse possession, commencing while that estate existed, and after the death of their mother, and not founded on title derived from her. Jackson *a.* Johnson (*supra*) is directly in point.

Whether an action to redeem is barred, though an action of ejectment may not be, I am not disposed to decide at present.

If, as between the plaintiffs and defendants now claiming to own the lot, the mortgage is to be deemed in equity a subsisting incumbrance, and he is to be deemed in equity an assignee of it, there are many reasons why the right to redeem should not be regarded as barred.

A doctrine or rule which requires them to redeem, would impose on them the burden of paying off the mortgage for the benefit of the tenant by the curtesy; while his estate, as such

tenant, in connection with the other mortgaged property, might be worth more than the amount of the incumbrance. It would impose this burden without conferring on them a right to the estate by the curtesy, or any interest in it. Though they should pay the mortgage debt, still they would have no right of entry or possession until that estate terminated.

And they would be compelled to do this merely to preserve their legal right to bring ejectment after the life estate had ceased.

In 2 Atk., 333 (*Anon.*), a redemption was allowed, and what was said in regard to the excuse of there being a tenant by the curtesy, was not involved in the judgment, and is purely *obiter*.

Raffety *a.* King (1 *Keen*, 602), which reviews all the prior decisions, strongly supports the decision of the judge at special term.

Instead of feeling at liberty to overrule his decision on this point, I prefer to not commit myself upon it, and not to pass upon the question, and to leave it open for further argument and consideration upon a retrial of the action.

That the right to bring ejectment is not barred, if such an action will lie, all agree.

What interest either plaintiff has on the lot, upon the evidence before us, if it be not lost by lapse of time, it is useless to discuss. The case made on a new trial, may be entirely different in this regard.

I concur in granting a new trial on the ground first stated, and place my concurrence on that sole ground.

Monell, J., concurred.

Barbour, J.—Nothing can be clearer to my mind than that this action cannot be sustained as a suit in equity, to redeem the land in question from the operation of the mortgage executed by Provoost and wife in 1809. The defendant is neither a mortgagee in possession, nor is that mortgage a lien upon the premises; nor has he even stood in the place of the mortgagee, except in regard to the life estate of John D. Provoost, which has terminated. At the time of the institution of the foreclosure suit, in 1815, Bishop, the mortgagee, had an equitable lien upon the land by his mortgage, to the extent of the life

estate therein of John D. Provoost, as tenant by the curtesy in possession, and also of the estate in fee belonging to Catharine Provoost at the date of the execution of the mortgage, if she was then, in fact, vested with such fee; and might, by foreclosure and sale, have reached either or both of those estates. If he had brought his suit against the heirs at law of Catharine, his decree would have covered the fee, subject to the life estate in case he proceeded against the husband alone. He was entitled to a decree for the sale of the life estate only. For some reason, perhaps because he was advised that Catharine's interest on the premises was merely an estate for life, and had terminated at her decease, in 1810,—or possibly under the belief that the sale of the estate of John D. Provoost would be sufficient, together with the other lot, to satisfy his heirs,—the mortgagee saw fit to proceed against the latter alone, and to sell his interest as tenant by the curtesy. If he was governed by the last-mentioned estimate, his opinion was justified by the result, for the proceeds of the life estate of Provoost in this lot, and of his fee in the other, were not only sufficient to pay the claims of the mortgagee, but left a considerable balance to be returned to Provoost. By that foreclosure and sale of the life estate, and without selling the estate in fee, the mortgage was fully satisfied and discharged, and the purchaser entered into possession, and, up to the death of John D. Provoost, occupied, with his grantees, the premises,—not as mortgagee, but as the absolute owner of the life estate purchased by him at the foreclosure sale, and nothing more; Catharine's heirs in the mean time remaining the owners of the fee, burdened with the life estate, but discharged of the lien of the mortgage. The purchaser at the foreclosure sale, who in this case was the mortgagee himself, not only by his purchase became seized of the life estate which he bought, but with his grantees, the defendants, became subrogated to all the rights of the mortgagee in that life estate; but only in such life estate. No interest in the estate in fee passed to the purchaser at the foreclosure sale by subrogation or otherwise, for he did not buy that estate, and took none of the rights of the mortgagee therein. In a few words, the defendant stands exactly in the shoes of John D. Provoost, whose interest in the premises, and only that, passed to the purchaser by the foreclosure sale. The fact that the

sheriff executed to such purchaser a deed in fee, is in this regard wholly unimportant. To decide otherwise, and that the grantee in such deed holds adversely to the owner of the fee, would be to establish the principle that any tenant, for a term extending beyond twenty years, may by his own deed, purporting to grant in fee, cut off the rights of the real owners of that title, which would be monstrous. It seems clear, therefore, that the plaintiff cannot sustain this action as a suit to redeem the fee of the premises from the operation of the mortgage, there being no mortgage lien upon such fee; nor any person, since the decease of the tenant for life, entitled, by subrogation or otherwise, to claim redemption-money or to remain in possession during the non-payment of moneys secured by mortgage. The interest by subrogation of the purchaser and his grantees, as well as their rights as owners of the life estate, terminated upon the death of John D. Provoost, and they never had any interest in the fee.

But this is not merely an action in the nature of a suit in equity to redeem the property from the lien of a mortgage: it has a double aspect. If the facts warrant it, the plaintiffs may, under the pleadings, be entitled to a judgment, as in an action of ejectment, for the possession of the land itself, or of an undivided portion of it, without condition of payment on their part. Without pausing to consider, therefore, whether the defendant in this case may avail himself of an error in a judgment awarding to him several thousand dollars as redemption-money, to which he is not entitled,—or the question as to whether the judge had jurisdiction at the special term to render a judgment at all, after a trial before him, without a jury, had shown (as I think it did) that the plaintiffs were not entitled to any relief in equity,—I pass to the examination of the further questions involved in the suit, and presented upon this appeal.

Assuming that the plaintiffs are the owners in fee, as the heirs at law of their mother, there was no possession by Bishop or his grantees, prior to the death of John D. Provoost, adverse to the title of such owners; the estate, by the curtesy, having been carried out of, and being held under and in subordination to, the fee. They were simply tenants, though for Provoost's life, and without payment of rents, of the owners in fee; and as such were liable to them for waste, &c. If, therefore, the plain-

tiffs are such owners in fee, they became entitled to the immediate possession of the premises upon the death of Provoost; and might then, or may at any time within twenty years after, but not before that period, maintain their action in the nature of an action in ejectment for the recovery of such possession.

But to enable the plaintiffs to succeed, it is absolutely necessary for them to show that Catharine Provoost died seized of the premises, or some portion of them in fee. Her father's will, given in evidence, did not establish this, for the devise was in general terms, and contained no words of limitation or inheritance, and therefore passed only a life estate. (Harvey *a.* Olmsted, 1 *N. Y.* (1 *Comst.*), 483.) Besides, even if the devise had carried a fee, the fee of this particular lot would not have vested in Catharine to the exclusion of her sister, by such devise alone, and without a severance by the three sisters of the property given to them respectively, and the setting apart of this parcel to Catharine. It was, therefore, incumbent upon the plaintiffs, in order to entitle them to recover more than the share falling to Catharine as one of the seven heirs at law of her father, to show that, by some act subsequent to the death of her devisor, Catharine's life estate became changed to an estate in fee in the lot in question; and this they attempted to do by the production of the alleged deed of 1805.

This deed states, upon its face, that it is made by Margaret, the widow of Peter Colyer; and Charles Colyer, Jacobus Colyer, Peter Colyer, James Van Cott, Eve Provoost, Margaret Tiebout, and Catharine Provoost (described in the deed to be the children, devisees, and heirs at law of Peter Colyer, deceased), with their respective wives and husbands; and after setting forth the will of Peter Colyer, and reciting the fact that doubts have arisen whether the words contained in the will are sufficient to pass estates in fee to Jacobus, Eve, Margaret, and Catharine, purports to grant and convey to each of the parties to such deed, by all the others, the lands devised to each of them by the will: one of the two lots in Essex-street being designated, and so conveyed to Margaret Tiebout; and the other, being the lot in controversy, to Catharine Provoost. But such deed is not signed, either by Jane Van Cott or Margaret Tiebout, two of the alleged children of Peter Colyer, or their husbands; and purports to be signed only by Margaret Colyer, the widow, and Charles

Colyer, Jacobus Colyer, Peter Colyer, Eve Provoost, and Catharine Provoost, five of the seven heirs at law, with their wives and husbands, although other seals are attached to the instrument opposite blanks. The name of Jane Colyer, too (stated in the body of the deed to be the wife of Jacobus), appears twice among the signatures,—one purporting to have been written by her, and the other attested by a mark or cross; and the three subscribing witnesses simply attest that it was "sealed and delivered in presence of" themselves, without stating whether all the persons, whose signatures are upon the paper, so sealed and delivered it, or only a part of them. Some of the persons, too, whose names appear among the signatures, signed in no other way than as marksmen; and there is no evidence upon the face of the paper that such marks were made by those persons. No evidence, beyond what may be inferred from the production of the papers themselves, was given touching its custody, at any time between the date of its alleged execution and the trial of action; and it does not appear to have been either acknowledged or recorded.

It is fully settled with us, that an instrument purporting to have been executed more than thirty years before it is offered in evidence, is not entitled to be read as an ancient deed upon presentation merely, and without further proof of its authenticity. The bare efflux of time is not sufficient. Proof that the paper offered has for that period been in the custody of the party who, if genuine, would be the proper person to hold it, is essential. Evidence of possession under the deed during the thirty years, or some other corroborative evidence of its authenticity is also necessary. (Jackson *a.* Luquere, 5 *Cow.*, 221; Jackson *a.* Lamb, 7 *Ib.*, 431; Hewlett *a.* Cock, 7 *Wend.*, 371; Wilson *a.* Betts, 4 *Den.*, 201.) In the case last cited, proof that the paper offered had been in the possession of the proper custodian for sixty years was held insufficient, in the absence of further corroborative evidence. And beyond all this, it is essential to the admission of the instrument as evidence, that it be wholly free from any just grounds of suspicion. (1 *Greenl. Ev.*, § 21, *n.* 1.)

At the time this deed was read in evidence, none of these prerequisite facts had been proven. The production of the paper by the plaintiffs does not establish a presumption that it had

been in their custody, or that of their ancestors, from the day of its date, for each of the parties to it, all being grantees, was as well entitled to its possession as was Catharine Provoost; and, for ought that appeared, some one of them had held it until after the day of the trial, notwithstanding they were her grantors. It is true, that after the deed was read in evidence, an attempt was made to prove that Catharine Provoost was in possession of the lot in controversy at some time previous to her death, in 1810; and the judge has found as a fact that John D Provoost, and Catharine his wife, were in the actual possession of the premises before and at the time of the execution by them of their mortgage to Bishop in 1809.

Upon a careful consideration of the evidence embodied in the printed case, I find myself unable to agree with the learned and able judge who tried the cause, in regard to this question of fact. There is no evidence whatever in the case tending to prove possession, to any extent, in Provoost or his wife, aside from what is contained in the testimony of Catharine Fogal; and that, it seems to me, is insufficient to establish such possession. She testifies, after the mists of more than half a century have gathered around her memory, that she played when a child, less than ten years old, not merely on the one lot in question, but upon two lots in Essex-street; being probably the two lots devised by Peter Colyer, with another lot in Eagle-street, to his three daughters, Eve, Margaret, and Catharine. If it may be inferred therefrom that the witness so played there by permission or direction of her mother, it is quite as reasonable to suppose that the mother exercised this right by virtue of her claim to all three of the lots, and her ownership in freehold of one of them, not as yet then set apart to her or severed, as it would be to assume that she had or claimed sole possession of the one in question; for, until partitioned, each of the sisters was equitably entitled to the possession jointly with the other two of either or all of the three parcels. The theory suggested will also apply to the alleged use of the lot stated by the witness to have been granted by her mother (who was incapable of making a grant without joining her husband) to Mrs. Tiebout, and the alleged possession of the latter;—a possession, by the way, thus attempted to be proved simply by the use of the legal term itself, without showing in what manner, or to

what extent it was had; the possession, too, of a vacant lot upon which there was no house, and where, notwithstanding such possession, the children of Mrs. Provoost were sent to play. But be that as it may, I think the testimony of Mrs. Fogal, as well as that of Colloon Randall, was inadmissible under the rule as it stood when such evidence was given. The case of Hasbrouck *a.* Vandervoort (9 *N. Y.* (5 *Seld.*), 153) seems to me to be conclusive upon that point.

Besides this, it is quite apparent that the instrument is incomplete as a deed, and could never have been delivered to any of the parties except for the purpose of being executed by them. The object and design of all the parties appears clearly to have been, not merely to carry into effect the intention of Peter Colyer, as expressed in his will, but to go beyond that, and grant by and on the part of all the heirs at law, a particular lot in severalty to each of the three daughters in fee, in lieu of the life estate which she had by the will, in an uncertain one of three lots; and also to grant and release to each of the other devisees the lands devised to them respectively, as well as to covenant, as they did with each other, that they would severally abide by the will, according to the construction thus given to it, and carry it into effect. The great object of each of the parties to the proposed deed, therefore, was to perfect and quiet the title to the land devised to him; and such grant and release to himself, constituted the consideration for his execution of the deed. This, then, being the motive of the parties, it is more reasonable to suppose that the deed was stopped in transitu by some of them, in its passage for execution, than to believe it was finally delivered to any of the parties as a complete deed before it was executed by all the grantees.

There is still another reason which ought of itself to have precluded the admission of the instrument, even if its execution by all the parties whose signatures appear upon it had been fully proved; that is, it did not prove nor tend to prove any fact stated in the complaint. Certainly, the title claimed by the plaintiffs to have been vested in their ancestors by a deed of a certain description, executed by fifteen persons named in the complaint, and in no other manner, cannot legally be proven by the production of a deed signed by eleven only of those persons. I am of opinion, therefore, that the deed was improperly

permitted to be read, and that there is no evidence in the case tending to establish the fact that Catharine Provoost was ever seized or possessed of a fee in the premises, except as one of the seven heirs at law of her father.

Considering, however, for a moment, that all of the persons named in the deed of 1805 as parties to it were heirs of Peter Colyer, and his only heirs at law; that the deed was duly delivered to Catharine Provoost by those persons whose signatures appear upon it, and that it was properly received in evidence;—still the judgment cannot be sustained, even upon the theory of the judge himself. For, in that case, the two heirs at law who failed to sign the deed are the owners of two-sevenths of the premises. So, too, as to Eve Colyer, a married woman, who signed the deed, but failed to acknowledge it in the manner required by the statute then in force, so as to render it effective. (1 *Webst. L. N. Y.*, 478.) Nothing passed by her deed, and she remains the owner of another seventh. Surely, then, the plaintiffs, who have obtained the judgment, are not entitled to the possession of that portion of the premises which is represented by those three-sevenths, even though it may clearly appear that the defendant has no right whatever to such possession. They must rest upon the strength of their own title, and cannot avail themselves of the weakness of that of their adversary.

I think, too, that the learned judge erred in dismissing the complaint as to a part of the plaintiffs, upon the ground that they were barred by the Statue of Limitations. The action was brought within twenty years after the death of the tenant for life, when the right of the plaintiffs to the possession accrued.

For these reasons, I am of opinion that the judgment cannot be sustained upon any supposable theory, and that it should therefore be reversed with costs, and a new trial granted.

As both the Chief-justice and Justice Monell deem the admission of the alleged ancient deed a fatal error, justifying a reversal of the judgment, and do not consider it necessary to pass upon the further questions embraced in the foregoing opinion, such opinion is not to be taken as that of the general term. It is filed simply as the conclusion to which I have, individually, arrived, upon an examination of the whole case.

Judgment reversed, and new trial ordered.

Criticised 15 Abb. N.S. 4 46 How. 246

HUSTED *a.* DAKIN.

Supreme Court, Third District; Special Term, Aug., 1857.
Again at General Term, October, 1857.

EXECUTION.—SALE OF REAL ESTATE.—ADVERTISEMENT.—REFEREE.—SURPLUS MONEYS.—LIENS BY JUDGMENT.—IRREGULARITY.—FRAUD.—SHERIFF.—STATUTORY POWER.

By a sale of land on a judgment, the lien of the judgment, and the right to redeem under it, are extinguished.

In like manner, any claim upon surplus moneys arising upon the foreclosure of a prior mortgage is extinguished by such a sale.

A judgment-debtor whose land has been sold on execution, subject to an antecedent mortgage, and whose equity of redemption has been subsequently foreclosed and sold, has no right to redeem under the statute, as a judgment-debtor whose real property has been sold on execution.

On a reference as to surplus moneys, under Rule 48, the referee can take into account only absolute liens, as distinguished from equitable claims, not matured into liens.

On a reference as to surplus moneys, under Rule 48, the referee, when he finds a lien regular and valid upon the record, has no right to go behind it to inquire whether it is irregular, fraudulent, or inequitable.

Nor when the referee has made his report, can the justice or regularity of the liens be examined upon the evidence taken before the referee.

The court will not allow such liens to be impeached collaterally, but only upon applications made directly for that purpose on a sufficient notice, in which the defects, irregularities, or frauds are specifically pointed out.

To sell together, on execution, land consisting of distinct parcels, is an irregularity merely.

On a reference to ascertain the claims to surplus moneys, objections cannot be raised to the regularity of proceedings in suits separate and distinct from that in which the reference was had, or to the good faith of the parties to those suits, or of the officers who were executing the process of the court therein.

A sale of real property on execution, advertised to be had under specified executions in the sheriff's hands, is not to be deemed a sale at the instance of a judgment-creditor, whose execution is delivered to the sheriff after the first publication of the advertisement, and is not specified, although the sale is postponed for more than six weeks after the reception of the junior execution, and such postponement is regularly advertised.

In selling property upon execution, the sheriff acts by virtue of a statutory authority which must be strictly pursued.

I. *August*, 1857.—Motion to confirm referee's report in regard to surplus moneys.

The foreclosure was instituted by Cornelius Husted, Silas Harris, Henry C. Myers, and George W. Barton, against Orville Dakin and others. There was a surplus of $11,918.62. The referee found and reported that the plaintiffs were entitled to the entire surplus, and that Fuller, Dayton & Co., E. & J. Willetts, and G. & H. S. Dakin, adverse claimants, were not entitled to any lien upon the surplus moneys.

It appeared that Fuller, Dayton & Co. recovered judgment in the Supreme Court, New York, against Orville Dakin, on the first of March, 1856, for $1,261.61, a transcript of which judgment was docketed in Dutchess county, on the 4th day of March, 1856. Wm. Edgar and Wm. E. Bird, recovered in the Supreme Court, New York, against Orville Dakin and Morgan L. Harris, three judgments, as follows: (1) one for $554.23, March, 13, 1856, transcript filed in Dutchess county same day; (2) one for $325.32, March 19, 1856, transcript filed in Dutchess county, March 20, 1856; (3) one for $494.87, April 16, 1856, transcript filed in Dutchess county April 17, 1856.

These three judgments were duly assigned to Edwin Willetts, the claimant herein, July 21, 1856.

Execution was issued on the Fuller, Dayton & Co. judgment on the 29th day of April, 1856: received by the sheriff of Dutchess county, May 6th, 1856.

On the 19th day of June, 1856, the sheriff advertised the real estate of the defendant—including the premises, in the sale of which, under foreclosure, the surplus moneys herein arose—for sale under the executions in his hands; to be sold on the 12th day of August, 1856.

Executions were issued on the three Bird judgments on the 23d day of July, 1856, and received by the sheriff of Dutchess county the same day; said executions being received by the sheriff after the notice of sale had been published, and no new notice thereof being made.

After numerous adjournments, the sheriff sold the said real estate on the 16th day of March, 1857, to the plaintiffs herein, for the sum of $200, and gave them a certificate therefor, said certificate reciting that said sale was made under said Fuller,

Dayton & Co. judgment, and the said three Bird judgments, with others; but not reciting it to be made under any of the judgments owned or claimed by the plaintiffs herein, though their executions were all in the sheriff's hands. And no note of their having been withdrawn was indorsed on said executions, or on the sheriff's book, in which is kept the register of the receipts of the executions, and what is done on them, and to which book all persons, inquiring at the sheriff's office, are referred for information in regard thereto.

The sheriff had previously announced that he would take no small bid for the property; even saying he would not receive a bid of $2,000.

At the alleged adjournment, made on the 24th day of December, 1856, neither the sheriff nor his deputy was present at the time and place of sale.

The plaintiffs claimed to have withdrawn their executions in the sheriff's hands before the sale,—part on the 20th of September, 1856, by letter, and part on the 9th of February, 1857, verbally, meeting the sheriff in his private office for that purpose. The executions remained in the sheriff's hands,—part of the time, at least, in the pigeon-hole with the active executions; and the alleged withdrawal was not noted on the executions, or in the sheriff's book.

Fuller, Dayton & Co. also claimed to have withdrawn their executions before the sale, on the 6th of March, 1856; their attorney testifying that he told the sheriff that he could not tell, till he saw his clients; but that, most likely, they would rely on the surplus moneys in the mortgage sale. That if no one was present, at the sheriff's sale, for Fuller, Dayton & Co., they would rely upon the surplus moneys.

The sheriff denied having any recollection of this having been said.

The same attorney also testified that the plaintiff's executions were tied up in a bundle. That the sheriff said that Eno, plaintiff's attorney, had tied them up a few days before, for some purpose—what, he did not know.

Of this the sheriff had no recollection.

A witness testified that, on the morning of the sale, the sheriff told him, "with regard to the real estate, he did not intend to sell, but meant to adjourn the sale."

This was denied by the sheriff.

The witness also testified that he heard, that day or the next, that the real estate was sold; and that he told persons, with whom he conversed that morning, that "the sale of the real estate was to be adjourned."

The real estate sold under the executions consisted of a farm of 350 acres, upon which were dwelling-houses and barns, making them susceptible of use as two or three separate farms; an ore-bed and a furnace, with several distinct and separate dwelling-houses, and lots around the same, which were all offered by the sheriff, and sold in one parcel.

On the 29th day of June, 1857, Orville Dakin, the defendant and person against whom the executions were issued, on which the alleged sheriff's sale was made and certificate given, tendered to the sheriff of Dutchess, the officer making said sale, the sum of $206, that being the amount bid, with ten per cent. interest thereon, said tender being made for the purpose of redeeming the said premises from the said sale and certificate.

On the 18th day of April, 1857, the ore-bed and furnace were sold, under foreclosure in this action, to the said plaintiff; from which sale arises the surplus moneys herein.

The referee excluded the judgments of Fuller, Dayton & Co., and the Bird judgments, owned by E. & J. Willetts, as not being liens on the surplus moneys, holding that all the rights, title, and interest acquired by said judgments were vested in the plaintiffs herein by virtue of the sheriff's sale and certificate.

The plaintiffs moved for the confirmation of the report.

William S. Eno and *John Thompson*, for the motion.

Joseph F. Barnard, opposed.

Davies, J.—The defendant, Dakin, being largely indebted, made and executed a mortgage to the plaintiff Husted and others, to foreclose, which this suit was instituted. Pending the foreclosure, and on the 16th of March, the sheriff of Dutchess, by virtue of executions issued on judgments against Dakin, as follows—

one filed	March 4,	1856,	for	$1,261.61
"	April 16,	"	"	494.37
"	March 19,	"	"	335.32
"	March 13,	"	"	554,23

and other executions (except on the judgments by virtue of which the plaintiffs claim the surplus moneys in this cause), sold all the right, title, and interest of Dakin in the said mortgaged premises; and the plaintiffs became the purchasers for $200.

On the 18th of April, 1857, the mortgaged premises were sold by virtue of the decree in this cause, and the plaintiffs became the purchasers.

The plaintiffs claim the whole of said surplus moneys by virtue of judgments held by them docketed against Dakin, most of them anterior to those of the other claimants, but some of them subsequent.

The report of the referee must be confirmed. It is too well settled in this State to be any longer questioned, that by a sale of land on a judgment, the lien of the judgment and the right to redeem under it, are gone. (See Shepard *a.* O'Niel, 4 *Barb.*, 125; and cases there cited.)

Applying that rule to the present case, it is seen that the liens of the claimants upon the mortgaged premises are extinguished by the sale by the sheriff on execution; and having no lien on the mortgaged premises at the time of the sale, it follows that they could have no lien on the surplus moneys. This is apparent from the words of Rule 48. Any party to the suit, or any person not a party, who had a lien on the mortgaged premises at the time of the sale, either by judgment or decree, may come in and claim the surplus.

It would seem to be equally well settled that on a reference to compute and ascertain the claims to surplus moneys under this rule, the liens referred to are those which subject the estate to sale on execution; such liens, as, without any further intervention of the court, would enable the holder of the lien to make sale of the property on which it was a lien. (King *a.* West, 10 *How. Pr.*, 333.)

It seems to me clear, therefore, that the holders of the judgments, upon which the mortgaged premises had been sold, had no liens thereon which entitled them to a portion of these surplus moneys.

But it was contended, on the argument, that this sheriff's sale was null and void by reason of the offer of Dakin to redeem the premises from the sale, and the tender by him to the sheriff of the amount bid by the plaintiff's thereat.

In June last, after the plaintiffs had become the absolute owners of the property by reason of the purchase on the mortgage sale, and the delivery to them of the sheriff's deed on such sale, the defendant, Dakin, tendered to the sheriff the amount bid by plaintiffs on the sale, on the 16th of March, 1857.

The difficulty in regard to this redemption is, that at the time it was made the defendant Dakin had no right, title, or interest in the premises sought to be redeemed. The plaintiffs had succeeded to all his rights; they had, in fact, become the assignees, by virtue of the purchase and sale on the 18th of April, 1857. This offer to redeem was therefore of no more import or effect than that of any stranger; and it would not, I am sure, be contended, that an offer by such stranger to pay the bid on the sheriff's sale, and claim from the sheriff the transfer of the purchaser's rights, would entitle him thereto, or would devest that purchaser of rights thus acquired, and render the sale null and void.

It seems to me, that the offer of Dakin to devest those rights is equally ineffectual; and that such offer did not render this sale void, and thus revive the lien of the judgments by virtue of which it was made. An order will be entered confirming the report of the referee, with a stay of proceedings until the next general term of this court, in this district, provided the claimants shall within ten days appeal from this order, and give security for the payment of the costs, and all damages which the plaintiffs may sustain in consequence of such appeal.

II. *October*, 1857.—Appeal from this order confirming referee's report in regard to surplus moneys.

Fuller, Dayton & Co., and E. & J. Willets, severally appealed from the foregoing decision to the general term.

Hawley & Glover and *J. R. Martin*, for the appellants.—I. The sale and certificate "became null and void" by the redemption of the premises sold. 1. The defendant in the execu

tions upon which the sheriff claims to have sold this property, is entitled to redeem it, within one year from the time of sale, by payment of the sum bid, with ten per cent. interest. (2 *Rev. Stat.*, 370, §§ 45, 46.) The subsequent sale under foreclosure, does not affect the defendant's right to redeem. The statute is absolute. The grantee acquiring title by sale under a mortgage, intended by the statute, is a mortgage made subsequent to the judgment, not before, as the mortgage was in this case. A grantee, before the judgment, would have no object in redeeming; and so of a mortgage before the judgment—the judgment-creditors would be cut off by foreclosure. Or, if not, it is not inconsistent that the right to redeem should be in both the judgment-debtor and the grantee, by deed or sale under a mortgage. The sale under foreclosure of a mortgage cannot affect in any way the rights of a mortgagor in the surplus moneys, which stand in place of the land. 2. Orville Dakin tendered to the officer making said sale, for the purpose of redeeming it, the sum of money bid on the sale, with ten per cent. interest, which is the same as payment on his part; and thereby "the sale of the premises so redeemed, and the certificate of sale," became "null and void." (2 *Rev. Stat.*, 371, § 49.) The sale and the certificate being "null and void," it is as though they had never been, and they cannot bar any rights that would have existed had that sale never been made, or that certificate never given. (Wood *a.* Colvin, 5 *Hill*, 228.) At any rate, the certificate of sale but gives the purchasers an inchoate right, subject to be defeated by the redemption of the premises by the debtor or other creditors; and until the time for such redemption has expired, and the purchasers have perfected their title by deed, they ought not to receive these surplus moneys. (Van Rensselaer *a.* Sheriff of Albany, 1 *Cow.*, 501; King *a.* West, 10 *How. Pr*, 333.) The giving the purchasers the amount bid with interest, as reported by the referee, is, in fact, a redemption of the premises, and is inconsistent with the claim of all the surplus moneys on said certificate. (Phyfe *a.* Riley, 15 *Wend.*, 248, 253.)

II. The selling the farms, ore-bed, furnace, and the dwellings, and the lots around, constituting one parcel, was such a non-compliance with the statute as should render the sale, and the certificate, ineffectual and void. (2 *Rev. Stat.*, 369, § 38.)

III. The sheriff not being present at the time and place appointed for the sale, on the 24th day of December, the whole proceedings fell through, and any sale on the alleged adjournment was irregular and void.

IV. We contend that there are facts and circumstances in this case that show legal, if not actual, fraud in said sale. 1. The selling several parcels in one parcel is evidence of fraud. (Woods *a.* Monell, 1 *Johns. Ch.*, 502; Mohawk Bank *a.* Atwater, 2 *Paige*, 54, 61; Ames *a.* Lockwood, 13 *How. Pr.*, 555.) 2. Inadequacy of price shows fraud. (Groff *a.* Jones, 6 *Wend.*, 522; Howell *a.* Barker, 4 *Johns. Ch.*, 118; 1 *Story's Eq.*, §§ 246, 247.) 3. The concealment by the sheriff of the fact of the withdrawal of the Eno executions. (Tinker *a.* Irvin, 1 *How. Pr.*, 112.) 4. The sheriff's announcement that the sale would be adjourned, and his intimation that it would not take place, unless some of them were present. (Collier *a.* Whipple, 13 *Wend.*, 224; Ames *a.* Lockwood, 13 *How. Pr.*, 555.) 5. In forcing the sale when so few were present, and just before the sale of the same property on foreclosure, the sheriff did not exercise a proper discretion. It was his duty to have adjourned the sale, when he saw there must otherwise be a great sacrifice of the property. (McDonald *a.* Neilson, 2 *Cow.*, 139.)

V. As to the Fuller judgment, the direction given by their attorney was, in case of no one being present at the sheriff's sale, an abandonment of the proceedings on their execution, and a virtual withdrawal of it from the sheriff's hands.

VI. As to the executions on the Bird judgments, they were not received by the sheriff until the advertisement of the sale had been made; so that the sale could not have been made under those executions. (Mascraft *a.* Van Antwerp, 3 *Cow.*, 334; Brewster *a.* Cropsey, 4 *How. Pr.*, 220.) There was no notice of sale under these executions, as there was not the notice required by law. (Olcott *a.* Robinson, 20 *Barb.*, 148.) In selling property, the sheriff acts by virtue of a power. If the power does not exist, no title passes. (Carpenter *a.* Stilwell, 11 *N. Y.*, 61.)

William S. Eno and *John Thompson*, for the respondents.—I. The powers, duties, and decision of the referee, in this proceeding, are regulated exclusively by Rule 48; and by that rule

the referee is restricted to a limited inquiry, to wit, "to the ownership, priority, and amount due upon any lien presented before him." If any of the judgments against Dakin had been fraudulently obtained, or irregularly, they should have been set aside by motion to the court. So long as they are suffered to remain, they are liens. The same principle applies equally to the validity of the sheriff's certificate of sale. Under that certificate, the claimants, Husted & Co., have acquired a specific lien on the premises to the extent of their bid. (Snyder *a.* Stafford, 11 *Paige*, 71; Shepard *a.* O'Neil, 4 *Barb.*, 125.) If the referee had the power, and his decision was a judgment to execute, important titles might be upset without notice. The question of undue influence or mental imbecility might arise. Questions which the Code provides, expressly, shall be tried by a jury, are heard and determined by a referee. (See King *a.* West, 10 *How. Pr.*, 333.)

II. By a sale of land under a judgment, the lien of the judgment is extinguished, and the right to redeem gone. (2 *Wend.*, 298; 4 *Cow.*, 136; 5 *Hill*, 228; 1 *Den.*, 633; 1 *Hill*, 110; 2 *Den.*, 344; 10 *Paige*, 249; 7 *Cow.*, 21; 1 *Barb.*, 388; 4 *Ib.*, 126.)

III. The general lien of the judgment is turned into a specific lien upon the premises, to the extent of the amount of the bid at the sheriff's sale and the interest. This specific lien belongs to the purchaser under the judgment; and he is entitled to the surplus moneys to the extent of his specific lien, in preference to a junior judgment-creditor. (Snyder *a.* Stafford, 11 *Paige*, 71; Shepard *a.* O'Neil, 4 *Barb.*, 125.)

IV. The surplus moneys are to be brought into court and paid to defendant, or any person who may be entitled thereto, subject to the order of the court. (2 *Rev. Stat.*, 192, § 159.)

V. These liens by judgment, referred to in Rule 48, are those which subject the land to be sold under execution, without further order of the court. (King *a.* West, 10 *How. Pr.*, 333.)

VI. It therefore follows, that no person is entitled to surplus moneys except he be the owner of the premises, or had a lien upon the land at the time of the foreclosure sale, upon which it could have been sold. The original judgment-creditors and purchaser cannot both claim under the same judgment. The effect of the sale is to transfer all the right of the judgment-

creditor, and the general interest which he had in the land by virtue of his judgment, to the purchaser; who thereby, until redemption, owns absolutely the premises, to the exclusion of all except prior liens. (20 *Johns.*, 13; 2 *Wend.*, 510; 1 *Barb.*, 518; 4 *Ib.*, 126.) The plaintiffs occupy all these different relations: 1. Prior judgment-creditors; 2. Purchasers at sheriff's sale; 3. Junior judgment-creditors redeeming.

VII. This attempted redemption by Dakin, on the 29th of June, 1857, could not in any manner operate to the advantage of the judgment under which the premises were sold, by reviving the lien of their judgment.

S. B. Strong, P. J.—The sale of the land of the defendant, Dakin, by the sheriff, was not absolutely void, as there was no clear departure from the directions of the statute; nor is there sufficient proof of any fraud. If for any reasons it had been voidable, the objections to it could not have been successfully urged in a collateral proceeding.

The interest acquired by the plaintiffs, under their purchase at the sheriff's sale, was, of course, subject to the statutory right of redemption. That was, as the word "redemption" imports, a right *in rem*, and could be inferred only by one having, at the time, an interest in or lien upon the land. Dakin's title had passed to the plaintiffs before he had offered to redeem. The right of redemption had, therefore, passed from him, and his offer was nugatory. The sheriff advertised and sold the lands, under the execution, in the suit of Fuller and others against Orville Dakin. Those plaintiffs had not, after such sale, any right to redeem. Their execution had not been previously effectually withdrawn. But there was no advertisement, and consequently no effectual sale, under the executions in favor of the Birds, or under either of them. Their right to redeem the land did not pass by the sheriff's sale, and it existed at the time of the sale under the mortgage. It was in no manner dependent upon the continuance of the title of the judgment-debtor, nor of his right to redeem. The rights of the debtor and of his judgment-creditors are distinct. The creditor may redeem after the debtor's right to do so has expired. The debtor could not deprive his creditors of their inchoate right by any voluntary act; nor would it pass by any conveyance to

which they were not parties. After the sale and conveyance under the foreclosure suit, it could not be executed *in rem*, but it would be transferred in equity to the proceeds. The rule providing for the inquiry as to the rights of lienholders to the surplus moneys on mortgage sales, was adopted for the purpose of protecting and enforcing such rights.

It seems to me, so far as I can ascertain the facts from the voluminous papers submitted to us, that the referee erred in rejecting the claims preferred by E. and J. Willetts, who are the assignees of the Bird judgments. I infer, from the papers, that the executions under those judgments were issued and delivered to the sheriff after he had published the advertisement under which (after several postponements) he sold the property. If that was not so, the referee can make a positive statement that the sale was made under an advertisement originally published under the Bird execution, as well as the others; and then his report may stand. But in order that he may do that, or, if that cannot be done consistently with the proofs, that he may correct his report by allowing the Willetts the preference to which they are entitled, the order of affirmance should be opened and the case sent back to the referee.

Birdseye, J.—I concur fully with the views expressed by the learned judge who decided this case at the special term, upon the points raised before him. But upon the argument before us, several other questions have been discussed, which will be briefly examined.

It is true that on a reference as to surplus moneys, under the forty-eighth rule of this court, the referee can only take into consideration absolute liens on the estate,—those which subject it to be sold, as distinguished from any equitable claims not matured into liens. (King *a.* West, 10 *How. Pr.*, 333.) But the referee, when he finds a lien regular and valid upon the record, has no right to go behind it, to inquire whether it is irregular, or fraudulent, or inequitable. He is to inquire, simply, whether a lien exists: not whether it ought to exist. That inquiry is reserved to the court, and can be made only on notice, and in such manner as to present the objection to the lien distinctly, and so that each party may be heard, and the decision may be reviewed. Whether such investigation be had

on motion, or more formally by suit, with pleadings presenting plainly the point to be litigated, it will be wholly distinct from the examination which would be had, if the claims of the appellants are sustained. For the referee, under the forty-eighth rule, proceeds without pleadings stating the rights or claims of the parties; and without notice, as between the conflicting claimants, of the nature of the claims they intend to assert. He has no power to conduct the investigation of any such matter. He is not a referee under the Code, and possesses none of the enlarged powers given to such a referee, by section 272 of the Code. He is only to fulfil the duties prescribed for him by rule forty-eight. He has done this, when he has ascertained and reported the amount due to the claimant, or any other person, which is a lien upon the surplus moneys, and has ascertained the priorities of the several liens thereon.

Nor when he has made his report, and a motion is made for its confirmation and for distribution of the surplus, according to its findings, can the justice or regularity of the liens be examined, upon the evidence taken before the referee. The court would, perhaps, have the power to make an order in regard to many of the usual objections to such liens, on such a motion. But I think we should not do so, collaterally; but only upon applications made directly for that purpose, on a sufficient notice, in which the defects, irregularities, or frauds shall be specifically pointed out.

These views will dispose of most of the objections discussed on the appeal, other than those which were rightly disposed of in the court below. Among these, is the objection that the lands, though they consisted of distinct parcels, were sold together instead of in single lots, which is a mere irregularity. (See Lambertson *a.* Marvin, 8 *Barb.*, 9; Griswold *a.* Fowler, 4 *Abbotts' Pr.*, 238). Also, the objection to the regularity of the adjournment of the sale, on the 24th of December, 1856; the alleged legal, if not actual fraud in the sale, at the time, in the manner and for the price at which the sheriff sold on the executions; the alleged concealment of the withdrawal of the plaintiff's executions; the supposed assurances of the sheriff, on the day of sale, that the sale would be adjourned; his failure to adjourn, to avoid a sacrifice of the property; and the supposed withdrawal of the execution of Fuller, Dayton & Co., by

the direction given to the sheriff by their attorney, on the 6th of March, 1857, that if no one was present at the sale on behalf of Fuller, Dayton & Co., they would rely upon the surplus moneys.

Each of these objections referred either to the regularity of proceedings in suits separate and distinct from that in which the reference was had, or to the good or ill faith of the parties to those suits, or of the officers who were executing the process of the court therein. To allow such matters to be inquired into, either before the referee, or on the motion to confirm his report, upon evidence offered before him, would subvert the established practice of the court, run counter to all settled principles of law, and expose to great danger the rights of all claimants to such funds.

The only remaining question arises on the following facts.

The sheriff's advertisement of sale was first published on the 19th day of June, 1856; the sale being fixed for the 12th day of August, then next. The notice stated that the sheriff, by virtue of sundry executions, to him directed and delivered, against the goods and chattels, lands and tenements of Orville Dakin, would expose for sale the lands described, &c. At the time of first publishing this notice, the sheriff held a large number of executions against Dakin, including, among them, one on the judgment of Fuller, Dayton & Co. But the executions on the three judgments of the Messrs. Bird, now held by the appellants Willetts, were not delivered to the sheriff till the 23d day of July, 1856.

The sale was not had on the day appointed, but was adjourned from time to time till the 16th of March, 1857, when it took place. The sheriff's certificate states that the sale was made upon the executions on the Bird judgments, as well as on many other executions. The adjournments were advertised, by reprinting the original notice of sale, with a notice of the postponement subjoined, and referring to the original notice for a statement of what the sale was to be. The notices of adjournment all state that "the sale of the above described premises is postponed." Some of the adjournments were for six weeks and more. The appellants now insist that "the sale" thus had was the same sale first advertised; that it could only be made on the executions referred to and described in

the original notice as those which had been, previously to that date, directed and delivered to the sheriff, and which were then held by him; that the adjournments only postponed the sale as thus limited; and that the attempt to sell on the executions subsequently received, was not merely irregular, but void, for want of a compliance with the statutory prerequisites to the sale of previous notice.

If this be so, the lien of the Bird judgments was not devested from the lands and transferred to the purchaser at the sheriff's sale; and the holders of these judgments are entitled to payment of them out of the surplus moneys,—the general lien of the judgments not being turned into a specific lien, in favor of the person bidding and receiving the sheriff's certificate.

In selling property upon execution, the sheriff acts by virtue of a statutory power. If the power does not exist, no title passes. (11 *N. Y.*, 61.) Every statute authority to devest the title of one without his consent, and transfer it to another, must be strictly pursued, or the title will not pass. (Olcott *a.* Robinson, 20 *Barb.*, 148.)

In Mascraft *a.* Van Antwerp (3 *Cow.*, 334), this court held that a sheriff who had advertised on but one execution, could not sell under that and another execution, by virtue of the same advertisement; though the other execution came to the sheriff's hands on the same day as the first execution, and might have been included in the advertisement of the sale. (And see Brewster *a.* Cropsey, 4 *How. Pr.*, 220.)

Neither of those cases is like the present, in all respects. In both of them, the advertisement of sale was in such form as wholly to exclude the subsequently received execution. And in neither of those cases did the sheriff assume to sell upon the second execution. In both cases the sale was without the consent of the defendant in the executions. Here, the advertisement of sale did, in fact, convey to the persons resorting to it for information, and inquiring of the sheriff upon what executions he designed to sell, notice that the sale would be made on the Bird executions. The sale was actually made on those executions. That fact is stated in the certificate. So far from such a sale being made without the consent of the appellants, the owners of those executions, the proof seems to me clear that they consented to it, and directed it to be made. The fact

that it was so made was known to the parties forthwith after the sale. They made a motion to set aside the sale, in the actions in which those executions were issued. But this defect in the notice of sale was not then pointed out. Nor was it discovered at the hearing before the referee as to the surplus moneys; nor on the motion at special term, to confirm the referee's report. But it escapes all observation, until this argument at the general term.

It is true, that the sale, as first advertised, referred to certain specified executions, not including those issued on the Bird judgments. The same sale thus advertised, was adjourned from time to time, and was subsequently had. There is a clear logical inconsistency between the sale as made, and that which was advertised. The sale was made on executions not intended to be the foundation of it in the notice.

For this reason, my associate is of opinion that the sale was void as to the Bird executions. I shall concur with him in this conclusion, though not without some hesitation and reluctance. The statute does not require the execution or executions to be described in the advertisement of sale. It is sufficient, if it state that the sale is to be pursuant to an execution or executions. The time and place of holding this sale were publicly advertised previously, for six weeks, in the manner prescribed by the statute. For more than six months previous to the sale, the reference in the notice to the executions under which the sale was to be had, if considered as then first made, would have included those issued on the Bird judgments; although, speaking as of the date of its first publication, it would not have included them.

All the direct and positive requirements of the statute as to notice of the sale seem, therefore, to have been complied with. Nor is it easy to perceive what beneficial consequence to any person could have resulted, had the sheriff, after receiving the Bird executions, in July, 1856, either abandoned the first notice of sale, and published a new one in its place; or, without withdrawing that, inserted another notice of a sale to be had under such other executions as had been delivered to him since the publication of his previous advertisement of sale. Either course, it would seem, would merely have increased the costs of advertising to be paid out of the proceeds of the sale.

It may be that the rule contended for by the appellants will work some inconvenience, if made a general one. There will be no little force in the suggestion of counsel in Mascraft *a.* Van Antwerp, that a debtor's property may never be sold, if every execution, as it comes to hand, requires another advertisement.

But, in its application to this case, the rule will only relieve the appellants from a loss which, at the utmost, is the result of a mere inadvertence on their part. The sheriff's sale was under the control of the senior judgment-creditors. It produced only $200; which was much less than the lands were really worth. The whole proceeds were swallowed up by the expenses of sale and the first executions. It seems like a hardship that the lien of the appellants' judgment should by such a sale be devested from the lands, and transferred to the bidder at the sale, and they thus excluded from sharing in the proceeds of property to which they were, in fact, entitled.

The order of the special term must be modified by declaring that the sheriff's sale, under the executions upon the judgments in favor of Bird & Bird, was void as to those executions, and that such judgments are liens upon the surplus moneys, and shall be paid in the order of their priority, with $10 costs of motion.*

WILLETT *a.* STRINGER.

New York Superior Court; Special Term, March, 1858.

PARTNERSHIP.—CREDITOR OF ONE PARTNER.—TRUST MONEY.—APPROPRIATION.—JOINT DEBT.—TRUSTEE.—RIGHTS OF CESTUI QUE TRUST.—PARTIES.

Where G. had given to W., his partner, a mortgage on the firm property, and subsequently the interest of W. in the property was sold on execution,—*Held*, that, as against W. & G., the purchaser acquired not only W.'s interest as a partner, but also his title under the mortgage.

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* EMOTT, J., being of kin to parties interested, took no part in the decision of this case; and the same was, by consent, heard and decided by the other two members of the court.

Where a partner lends trust-money to his firm, no debt is created against the joint estate in favor of the *cestuis que trust*, unless the fact of its being trust-money is known to the other partners.

A mortgage of partnership property, executed by one partner to secure a debt due by the firm, is valid.

Where trust-money has been, by the trustee, so appropriated to his own use as to be undistinguishable from his individual means, his creditors, and especially those who have been misled by acts of his, inconsistent with the existence of a trust, are entitled to reach the trust-money as his.

So held, where the creation of the trust seemed suspicious, and the trustee had always employed the fund as his own in carrying on business.

Although the rights of *cestuis que trust* are more properly to be determined in an action by or against the trustee, yet the court will, in proper cases, allow them to come in and assert their claims.

This rule applied where a judgment was about to be rendered adverse to infant *cestuis que trust.*

Trial by the court.

This action was brought by Charles S. Willett, trustee of Charles M. and Drusilla Willett, infants, against James Stringer, William A. Townsend, and Robert and George Billin, to obtain an injunction, and other special relief. The facts and the questions involved will be understood from the opinion.

Augustus Cornwall and *Albert Matthews*, for the plaintiff.

John Graham, for the defendants.

Hoffman, J.—My conclusions are as follows:

First. The title of Stringer and Townsend rests exclusively upon the judgment and execution, obtained and issued in favor of the Harpers, and the purchase, at the sheriff's sale, under the same. The rights which the Harpers could have asserted, had they purchased, can be asserted by these defendants, and none other.

Second. That judgment, execution, and sale were, in themselves, ineffectual, as against Grossman individually, or as against the partnership property in hostility to partnership creditors. It directly affected and transferred only the interest of Willett in the partnership effects. (Stringer *a.* Willett, *Jan. T.*, 1857.)

Third. But as connected with the mortgage in question, Stringer and Townsend acquired by the purchase certain rights. 1st. They acquired the right to insist that it was in

truth Willett's mortgage; that is, that the money had been advanced by him out of his own funds; or, to say that it was fictitious and without consideration; or to impeach it and set it aside on other grounds. Thus they would free Willett's eventual interest from such amount of incumbrance. 2d. They obtained a right to claim that if the consideration of the mortgage was honest and full, and yet the money was, in fact, Willett's, they had purchased his title to the mortgage, and also Grossman's interest in the partnership property, to the extent of the amount secured by it.

Upon this theory, had Grossman been the absolute owner at the time of the mortgage, with no partnership between him and Willett, Stringer and Townsend would have a title and right in the property to the extent of the mortgage, subject to any prior liens. The sheriff's sale transferred Willett's right to the mortgage, and what it covered.

But if Grossman and Willett were really partners when the mortgage was given, then, as against partnership creditors, it was unavailing as to the partners, and must be so as to Stringer and Townsend. Still, as between these parties themselves, it operates upon the eventual interest of each of them, and neither of them can claim any right adverse to these defendants under it. All their rights respectively under it have passed.

Fourth. As between Grossman and Willett, there was no partnership at the date of the mortgage. The actual agreement of the 8th day of May, 1854, with the omission to sign the paper which would have constituted one, with some other evidence, leads me to this result.

But the evidence is decisive to establish a partnership as to strangers.

It is also clear that Willett represented himself to be a partner, to Stringer and Townsend; that he stated to them his having invested from eight to ten thousand dollars in the concern; that his representations induced them to give a credit, which otherwise they would not have given, to Grossman; and which effectually led them astray.

Hence, as between Willett and these defendants, on the assumption of its being Willett's money for which the mortgage was given, it is wholly immaterial whether there was a partnership or not. If it profits the defendants to assert that there

was a partnership, Willett cannot be allowed to gainsay it. If it is for their advantage to make out no partnership, they are free to do so as to him.

Fifth. But what will be the legal conclusions on the supposition of the moneys being really trust-funds in Willett's hands?

When a partner lends trust-moneys to his firm, if the fact of its being trust-money is unknown to the other partners, no joint debt is created which can be proven against the joint estate. (Jaques *a.* Marquand, 6 *Cow.*, 479.) But if the other members are aware of the fact, then the firm and its property is responsible. It is treated as the borrowing the money of a stranger, through an agent or trustee. (Hutchinson *a.* Smith, 7 *Paige*, 26; Whitaker *a.* Brown, 16 *Wend.*, 509; Richardson *a.* French, 4 *Metc.*, 577.)

The principle is shown in the rule in bankruptcy. One partner may prove that his copartner is indebted to him on the partnership account; but his proof is unavailable so as to entitle him to receive any thing until all the joint-creditors are paid in full. (*Coll. on Part.*, 972; 6 *Hill*, 583.)

But if trust-moneys are brought into the firm by a member, and appropriated to partnership purposes, the *cestuis que trust* cannot be admitted to prove against the joint estate, unless the other partners knew of the funds being trust-funds. (*Exp.* Heaton, *Buck*, 386; *Exp.* Apsey, 3 *Br. Ch.*, 265; *Exp.* Watson, 2 *Ves. & B.*, 414.) See particularly Lord Eldon's judgment in the last case.

A joint debt may, then, be thus created to the beneficiaries of a trust-fund with the knowledge and assent of all.

It seems also clear, that one partner can execute a mortgage of the partnership property, to secure such a debt. The cases are collected in Coll. on Part., §§ 396–398. He cites, also, Tupley *a.* Butterfield (1 *Metc.*, 515), in which it was expressly held that a mortgage can be executed by one partner to bind the partnership property. (See, also, Anderson *a.* Tompkins, 1 *Brock.*, 456; Deckard's Case, 5 *Watts*, 22; and Milton *a.* Morher, 7 *Metc.*, 244.)

And if the assent of the copartner is requisite, that is found in the present instance.

I do not think that the authorities in our own State establish any different rule. (Hitchcock *a.* St. John, *Hoffm.*, 511.)

The fact that the mortgage was taken to Willett as trustee, when he was a partner, would never be permitted to defeat the rights of the children, if the transaction was in truth on their account, and the funds were theirs.

Sixth. The question is reduced to this: Were the moneys advanced to Grossman, and for which the mortgage was given, the moneys of the children, or not?

In 1849, it is alleged, the father of Mrs. Willett sold some real estate, and expressed a wish that the proceeds might be applied to his daughter and her children's use. Willett received them, and down to 1852 he had the possession, control, and disposition of them. They were legally his own, were used as his own, and there is no trace of the wife or any one else interfering with his management, or claiming an interest in the funds.

In 1852, Mrs. Willett makes the will produced in evidence. She gives the sum of $4,388.75, reciting that she holds it in her own right, to her children, and the use to her husband in the manner provided, which it is needless to detail.

The money was then in Willett's hands, in money or notes.

On the 8th of May, 1854, a mortgage was executed by Grossman to one M. M. Barker, to secure the sum of $4,000. The money came from Willett. He had advanced about $587 before that date, in cash; taken up notes of Grossman to the amount of about $2,500, and the balance paid afterwards Such is Willett's statement of this transaction.

By an instrument dated the 10th of December, 1854, this mortgage was assigned by Barker to Willett, described as Charles S. Willet, trustee of C. M. and D. T. Willett. This instrument was never acknowledged; nor was it proven, until the 10th of March, 1858. It was drawn with the assignee's name in blank, and the blanks are filled up by Willett.

On the 1st of May, 1855, the mortgage in question in this suit was executed by Grossman to Willett, described as trustee for Charles M. Willett and Drusilla Willett. It was filed on the 19th of May, 1855, and has been duly renewed and refiled.

The consideration, as alleged by Willett, was the $4,000, the amount of the former Grossman mortgage, and various subsequent advances made by Willett to him, or on his account, in the interim between the dates of such instruments.

In the summer of 1854, and again in 1855, Willett applied for a loan, and said that the lender could have a first mortgage on the presses.

The mortgage in question has been, on several occasions, pledged as collateral security with parties who advanced money for the use of Grossman and of Willett.

In October, 1856, Willett proposed to Stringer & Townsend, that they should purchase the property at the price of $12,000, and represented that there was a mortgage to himself, which he could control, and was no lien upon the premises. He prepared and exhibited a document (Exhibit No. 1) of the manner in which this consideration was to be liquidated. A mortgage held by Adams & Co., upon a portion of the property, for the notes of Grossman, indorsed by Willett, amounting to $1,495.04; five notes of Grossman, secured by a mortgage of his own to Derrickson & Co., amounting to $1,410.10; Grossman and Willett's eight notes, amounting to $3,587.21, held by Stringer & Townsend, were to be returned, and Stringer & Townsend's notes to be given, and dated the 25th of November, 1856, for the sum of $4,526.60, with a sum due the same parties of $981.05, made up said consideration of $12,000.

And an instrument was prepared by or under the direction of the said Willett, being a proposed bill of sale of the property, to carry out the arrangement aforesaid, in which the terms of the purchase and mode of payment, as above stated, are fully set forth; and in which is a clause, covenanting that the premises are free and clear of all and every valid or legal incumbrance or charge whatsoever, other and excepting the mortgages executed to and held by the firms of Adams & Co., and of J. T. Derrickson & Co., to secure the payment of the notes held by such firms respectively.

About the 3d of December, 1856, a satisfaction-piece of such mortgage was prepared by direction of the said Willett, and portions of it which were in blank were filled up by him in pencil. An instrument of release was also prepared under his direction, and he had agreed to assign such mortgage to the said Stringer & Townsend, in case such a mode of disposing of it was preferred, in carrying out the purchase of the said property, negotiated for between the parties.

Willett states that the trust-moneys were to be preserved after

the mortgage was satisfied, by taking a part of Stringer & Townsend's notes, of the aggregate of $4,526.60; but the amount he could thus take was dependent upon the proportion which was to be applied to the Bruce mortgage. Again, the notes would be, on their face, partnership property; and when collected, the funds would be in Willett's hands, utterly undistinguished, and entirely under his control.

Seventh. Upon this evidence, the conclusion appears to me unavoidable, that as between Willett and his creditors, and especially as between him and Stringer & Townsend, the moneys secured by this mortgage must be deemed to have been his own, and the right and interest in the mortgage vested in him individually. It is impossible to trace trust-moneys in this security on this evidence.

Eighth. But this will be to determine the case against the infants without their being heard, otherwise than through their trustee. It is not to be questioned that, under section 113 of the Code, he fully represents them, and can sustain the suit alone. It seems also clear, that it will be difficult to vary the case now presented in its material features, or to prepare it better. But I do not understand section 113 to be more than permissive; and I consider that, in a proper case, the court may still require the presence on the record of *cestuis que trust*, in accordance with the rule in chancery, and the spirit of section 111 of the Code.

The action must stand over for fifteen days, to allow the infants, or some one on their behalf, to apply for the appointment of a guardian, who may make himself, on their behalf, party to this suit by supplemental complaint. Upon the same being at issue, the cause may be retried; but the evidence now taken shall be evidence in the case, with liberty to such guardian to introduce further testimony, to re-examine witnesses, and to reargue the cause.

In case no application is made within such fifteen days from service of this order, the complaint to stand dismissed with costs, and judgment to be entered accordingly.

AGATE *a.* KING.

Supreme Court, Second District; General Term, February, 1862.

COUNTER-CLAIM.—FORECLOSURE.

The right of the plaintiff to claim, and the right of the defendant to counter-claim, upon any given or supposed facts in controversy, must be reciprocal.

Thus, in an action for the foreclosure of a mortgage, defendants not personally liable to pay the amount secured, cannot interpose a counter-claim arising out of transactions unconnected with the subject of action.

Appeal from a judgment.

This action was brought by Joseph Agate against Joseph King, Samuel Fleet, and his wife, to foreclose a mortgage for $682. King was the owner of the equity of redemption, but was not personally liable for the mortgage debt. He alone defended, merely setting up a counter-claim, for $6000, an amount paid by him to the plaintiff as the consideration of plaintiff's contract to convey to him a tract of land, which contract the answer averred that the plaintiff had failed to perform. A reply was interposed, denying all the allegations constituting a counter-claim. The cause was tried before a referee. The defendant was allowed to give evidence to establish his counter-claim. The plaintiff was allowed to prove the execution and delivery of a deed of the land which he had undertaken to convey. The referee found in favor of the plaintiff, against the counter-claim, and ordered judgment of foreclosure and sale. The defendant, King, appealed.

Culver Patterson, for the appellant.—I. The findings of fact by the referee are not sustained by the evidence in the case.

II. A counter-claim must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff, if the plaintiff has not sued the defendant. (Vassear *a.* Livingston, 13 *N. Y.*, 248; Lemon *a.* Trull, 13 *How. Pr.*,

248; affirmed, Court of Appeals, 16 *Ib.*, 576, *note*; National Fire Ins. Co. *a.* McKay, 21 *N. Y.*, 191; Code, § 150.)

III. The referee also erred in permitting the deed to be put in evidence; for the reason that there was no such issue. The plaintiff, in his reply, denies that defendant ever demanded a deed; in fact, he denies every allegation specifically. (McKyring *a.* Bull, 16 *N. Y.*, 297.)

IV. If illegal testimony be received, and may have had weight with the jury, on a material point, the court has no discretion to refuse a new trial. (Weeks *a.* Lowerre, 8 *Barb.*, 530; Main *a.* Eagle, 1 *E. D. Smith*, 619.)

Niles & Bagley, for the respondent.—I. The matter set up in the answer does not constitute any defence. No claim is made against King; he, therefore, can have no counter-claim of which he can avail himself. The parties have no cross-demands, one of which may cancel the other. (Van Valen *a.* Lapham, 13 *How. Pr.*, 240; Spencer *a.* Babcock, 22 *Barb.*, 326.)

II. The right of the plaintiff to claim, and the right of the defendant to counter-claim, must be reciprocal. (Xenia Branch Bank *a.* Lee, 2 *Bosw.*, 694; S. C., 7 *Abbotts' Pr.*, 372.)

III. The action to foreclose a mortgage is not an action on contract, within the meaning of that section of the Code referring to counter-claims.

IV. If King can set up a counter-claim, so can twenty other defendants who may have some interest in the property, or the surplus, or some liability on account of the mortgage.

V. Even if this were the subject of a counter-claim, it did not exist at the commencement of the action. (13 *How. Pr.*, 240.)

VI. Even if it were a proper subject of counter-claim, and had existed at that time, it is not proved.

By the Court.—Scrugham, J.—The plaintiff brought this action to foreclose a mortgage, executed to him to secure the payment of $682, with interest, by Catharine Fleet, and her husband Samuel Fleet, upon land in the village of Jamaica, which was afterwards conveyed by them to the defendant, Joseph King; but King did not agree to pay the amount due on the mortgage, and no personal claim is made against him.

The defendant King does not deny any of the allegations contained in the complaint, but alleges that, before the commencement of this action, the plaintiff made and delivered to him his agreement in writing, whereby, in consideration of an assignment to him of three notes drawn by one Burrows, secured by a mortgage on land in Wisconsin, and amounting together to the sum of $5,200, the plaintiff agreed to convey to him, by warranty deed, 150 acres of land near Lakeland, Long Island, subject to a mortgage of five dollars per acre; and that in consideration thereof he delivered to the plaintiff the notes mentioned in the agreement, together with a quantity of soap, tea, and screws, which, he claims, formed a part of the consideration of the agreement, in addition to the notes. He alleges that the plaintiff has failed to fulfil this agreement, and sets up, as a counter-claim in this action, a claim against the plaintiff on that account for the value of the articles which, he claims, were delivered by him to the plaintiff on receipt of the agreement, and for $5,200, being the amount of the notes mentioned in it, with interest on both claims.

The action was tried before a referee, who admitted evidence of the defendant's alleged cause of action against the plaintiff, notwithstanding the objection of the plaintiff's counsel, that it did not constitute a counter-claim to the plaintiff's demand in this action.

As it was not a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action, it was clearly not admissible as a counter-claim under the first subdivision of section 150 of the Code.

So far as the section authorizes the interposition of any other counter-claim, it may be read as follows: In an action arising on contract, any defendant between whom and the plaintiff a several judgment might be had, may interpose as a counter-claim any other cause of action arising on contract, and existing at the commencement of the action in his favor and against the plaintiff.

The first requisite then is, that the action in which the counter-claim is to be interposed shall be an action arising on contract.

This action is for the foreclosure of a mortgage, a legal rem-

edy somewhat anomalous. As against the mortgagor, and all persons who have assumed or become liable for the payment of the amount secured by the mortgage, it is an action arising on contract; but it cannot be so considered in reference to those parties who have made no agreement in relation to the mortgage or the sum secured by it; and who are made parties only because they have claims upon the land mortgaged, which the plaintiff desires to foreclose. As to them, there is no contract on which they are liable, and therefore none on which an action can arise against them. The mortgagee seeks by the action to enforce his right to an absolute sale of the mortgaged premises; and the interest of those who have equities of redemption being adverse to this, they become necessary parties to the action. This right in him, and adverse claim by them, constitutes his cause of action against them. It may be said to grow out of the contract which was made when the mortgage was executed, and which is evidenced by it; but it does not arise on that contract. A distinction between causes of action arising on contract, and causes of action arising out of a contract, is indicated by the phraseology of this section of the Code. (*Code*, § 150; Xenia Branch Bank *a.* Lee, 2 *Bosw.*, 694; S. C., 7 *Abbotts' Pr.*, 372.)

It was said in the case cited, that "the right of the plaintiff to claim, and the right of the defendant to counter-claim upon any given or supposed facts in controversy, must be reciprocal."

In this case, if an action had been brought by the defendant against the plaintiff, for a breach of his contract to convey the Lakeland property, this mortgage would not constitute a counter-claim, for the plaintiff can make no claim upon it against the defendant King.

It must be conceded, that if the owner of the equity of redemption, who has not assumed the payment of the mortgage debt, can interpose a counter-claim under the second subdivision of section 150 of the Code, in an action to foreclose the mortgage, any judgment-creditor, or other party who has been made a defendant by reason of his claim upon the mortgaged premises, may do likewise; for the description in that section of the persons who may interpose counter-claims, will apply as well to the one as to the other. The complications, evils, and

delays consequent upon such a practice, make it apparent that it was not intended to establish it.

In the case of the National Fire Ins. Co. *a.* McKay (21 *N. Y.*, 191), this question was not decided; but Judge Comstock says, "In a foreclosure suit, a defendant who is personally liable for the debt, or whose land is bound by the lien, may probably introduce an offset to reduce or extinguish the claim."

Evidently an expression so limited was not intended to be regarded as authority; but the views which I have expressed, are not inconsistent with the idea that such a defendant might introduce such a counter-claim as is specified in subdivision 1 of section 150 of the Code. That subdivision does not, like subdivision 2, confine the interposition of the counter-claims authorized by it to actions arising on contract.

The referee erred in admitting evidence of the facts going to establish the alleged counter-claim; but as he has decided that the defendant has not established it, and has not allowed it in his report, but finds the plaintiff entitled to judgment of foreclosure and sale for the full amount appearing to be due upon the bond and mortgage, the judgment entered upon his report should be affirmed.

DRAPER *a.* BEERS.

Supreme Court, First District; At Chambers, May, 1863.

ORDER OF ARREST.—DEBT FRAUDULENTLY CONTRACTED.

To justify an order of arrest for fraud in obtaining credit, the affidavit must state the particular representations made, and in what respect they were false. A general allegation of falsity is not enough.

Motion to vacate an order of arrest.

This action was brought by Edward T. Draper and Elizabeth Clark, to recover $85 51, the price of certain merchandise. An order of arrest was issued on an affidavit as follows, omitting formal portions: "That on or about the 29th day of January, A. D., 1863, the above-named defendant applied to the plaintiffs

and requested them to sell and deliver to him goods, wares, and merchandise, for the business of defendant, carried on at 621 Eighth avenue, in said city of New York. Defendant stated to deponent that he would buy a bill of goods of him on thirty days.

"Deponent said he would as soon sell them to him as any one else, if he would pay him for them at that time. He then said that business was very good with him: that the week before was one of the largest weeks he had had since he had been there; and he said he was making more money as his goods were increasing in value, and he had bought some of them very low. He said also that he would like that store then occupied by plaintiffs, and wanted to know the rent of it. I told him the rent, and he said he thought he would do enough more business to make it pay. He said he had about four thousand dollars worth of goods in his store, and had no bad stock at all. He said he was doing a good business, and his expenses were very light.

"That deponent, relying on said representations, and believing the same to be true, sold and delivered to said defendant, on the said 29th day of January, 1863, goods, wares, and merchandise of the value, amount, and price of eighty-five dollars and fifty-one cents. That on or about the 21st day of February last, deponent told defendant that he had heard he was about to sell out to his brother-in-law; and he replied that it was not so, and that he had no such intentions. That defendant claims now that he has sold out to his brother-in-law, who lives in Connecticut, and yet he kept still in possession of said store, and sold goods as before, until Saturday last, when the store was closed in consequence of an attachment obtained against defendant by Messrs. Haviland, Lindsley & Co. of this city, and a deputy sheriff put in charge. Deponent further says, that the said representations so made as aforesaid were wholly false and untrue, and the said defendant well knew at the time he so made the same that they were wholly false and untrue; and that they were so made by said defendant with the false, fraudulent, and corrupt design and intent to cheat and defraud these plaintiffs out of their said property, and to obtain possession of said merchandise without paying any thing therefor. Deponent further says that the plaintiffs are about to commence an action in this

court against the defendant, for said sum of eighty-five dollars and fifty-one cents.

On an affidavit contradicting and explaining some of plaintiff's allegations, defendant moved to vacate the order.

James D. Stevenson, for the motion.

Stitt & Ruston, opposed.

LEONARD, J.—The affidavits to authorize an order of arrest for fraudulent representations, whereby the defendant procured the sale and delivery of personal property, must not only set forth the particular statements or representations made in order to obtain the property, but must also set forth in what respects they are false. A general allegation that the representations made are false and fraudulent, is not sufficient.

The affidavit here is defective in this respect.

The order of arrest is vacated, with $10 costs of motion.

WOODRUFF *a.* WOODRUFF.

Supreme Court, First District; General Term, December, 1863.

SURROGATE.—ACCOUNTING.—PARTNERSHIP.

After the expiration of eighteen months from the granting of letters testamentary or of administration, the surrogate, upon the petition of any creditor, legatee, or next of kin, or upon his own motion, may require the executor or administrator to file an account of his proceedings.

A sole acting executor may be required to do so at the instance of a legatee, though the latter is also executrix.

On an accounting before the surrogate, the executor or administrator may be required to disclose the assets of a partnership of which himself and the deceased were members at the time of the death of the latter, although the interest of the deceased in the firm is entirely unliquidated.

In this respect there is no difference in the authority of the surrogate on an intermediate accounting, under 2 Rev. Stat., 92, § 52, and on a final accounting.

Appeal from an order of the Surrogate's Court.

The appellant was Marcus P. Woodruff, executor of John O. Woodruff, deceased. The respondent was Emily B. Woodruff,

widow, executrix, and residuary legatee, under the will of John O. Woodruff. The appellant, the deceased, and one Robert M. Henning, had been copartners in the firm of Woodruff & Co. Under an order of the surrogate of New York, made upon the petition of Mrs. Woodruff, the appellant filed an account or statement, under oath, in which he stated the interest of said John O. Woodruff, at the time of his death, in the said firm of Woodruff & Co., to be one undivided third part thereof; and that the same was as yet unliquidated, and no part thereof had come into the hands of the appellant, as such executor, except as stated in his original account.

Upon this the surrogate further ordered that the accounting of the appellant, as such executor, be proceeded with, and that he produce on said accounting the papers and books of account of the late firm of Woodruff & Co., and that he submit to such examination as may be necessary to disclose the accounts of said John O. Woodruff with said firm of Woodruff & Co., at the time of his death. From this order the appeal was taken.

Marsh, Coe & Wallis, for the appellant.—I. The executor cannot be called upon to render an account on the application of the executrix, his co-representative.

II. The executor, Marcus P. Woodruff, has complied with the direction of the citation.

III. This is an intermediate, and not a final accounting. (Guild *a.* Peek, 11 *Paige*, 475.) A final accounting is had on the voluntary act of the executor, either when cited to account by a creditor, or on his own original application, and notice to all parties interested. (2 *Rev. Stat.*, 93, § 60; *Ib.*, 95, § 70.) If the executrix had wished to have the estate finally settled, she could have demanded a final accounting, and had the whole matter gone into. The only thing to be passed upon, on her present application, is the ability of the estate now to pay her legacy. This, it has been clearly shown, is impossible.

IV. The surrogate has no power to order an accounting between the surviving partners of the firm of which the testator was a member. That power belongs only to the courts of equity. (Magee *a.* Vedder, 6 *Barb.*, 352; Disosway *a.* Bank of Washington, 24 *Ib.*, 60; Egberts *a.* Wood, 3 *Paige*, 517, 525; Smith *a.* Jackson, 2 *Edw.*, 28; Case *a.* Abeel, 1 *Paige*, 393.)

V. Assets of a partnership in the hands of the administrator of a surviving partner are not assets of his intestate; and his management of the partnership affairs is not the subject of an accounting before the surrogate. (Thompson *a.* Thompson, 1 *Bradf.*, 24.) Marre *a.* Ginochio (2 *Bradf.*, 165), was where a final accounting was being had on the voluntary application of the executrix; and the surrogate puts his decision on the express ground that it was a final accounting. In fact, it was not an accounting between partners, but of assets theretofore received from the firm.

Waldo Hutchins, for the respondent.—Mrs. Woodruff, co-executrix under her husband's will, being a party in interest, has the right to cite Marcus P. to account before the surrogate. (Smith *a.* Lawrence, 11 *Paige*, 206; aud cases there cited.)

II. When the surviving partner is the executor of the deceased partner, a statement of the partnership affairs is incident to the settlement of the accounts of the executor, and can be proceeded with before the surrogate. (Marre *a.* Ginochio, 2 *Bradf.*, 165.)

III. The order appealed from is regular, and should be affirmed. (2 *Rev. Stat.*, 92, § 54; *Laws of* 1837, 537, ch. 460, § 76; Jackson *a.* Jansen, 6 *Johns.*, 79; Seymour *a.* Seymour, 4 *Johns. Ch.*, 409; Rogers *a.* King, 8 *Paige*, 210.)

Clerke, J.—Inasmuch as the appellant was the sole acting executor, and as the respondent was a legatee under the will, she had the right, in that capacity, to cite him to render an account as such acting executor.

The order of the surrogate of the 23d of Jan., 1863, was not made for the purpose of liquidating the affairs of the copartnership, but for the purpose of ascertaining what amount the appellant had collected as executor, from the assets of the firm, for the benefit of the estate of the testator. Surely, if he was not a copartner of the testator in that firm, he would be liable to account for all sums of money which he had realized from the assets. Can the fact that he was a copartner, exempt him from such liability? This species of accounting before the surrogate, in no respect encroaches upon the jurisdiction which alone belongs to this court as a court of equity,—should its interposi-

tion be necessary in adjusting the rights of the respective members of the concern, as their representatives,—in protecting and disposing of the property for the benefit of all to whom it may belong, or who may have demands upon it,—in compelling the surviving partner to account for the stock which has come into his possession, or, if he has carried on the business since the death of the deceased partner, to account for the profits made by him; and finally, in winding up the affairs of the concern. This the surrogate has not attempted to do by the order appealed from. As to the objection, that the executor cannot be compelled to account in the way required by this order, because it is not a final accounting, the 57th section of the act relating to the duties of executors and administrators, &c. (2 *Rev. Stat.*, 92, § 52; *same stat.*, 3 *Rev. Stat.*, 5 ed., 178), authorizes the surrogate, at any time after the expiration of eighteen months from the time of his appointment, to order an executor or administrator to render an account of his proceedings, upon the application of a creditor, a legatee, a next of kin, or without such application. Upon being thus required to render an account, the executor or administrator may, if he desires it, have the same finally settled. But, this in no respect affects the right of any party interested, or of the surrogate on his own motion, to require him to render an account, which may or may not, according to the course of events, prove to be final.

The order of the surrogate should be affirmed with costs.

SUTHERLAND, P. J., concurred.

BARNARD, J., expressed no opinion.

MATTER OF BORSDORFF.

Supreme Court, First District; General Term, Dec., 1863.

DEATH OF PARTY.—REVIVOR.—SUPPLEMENTAL COMPLAINT.

On the expiration of a year from the death of a party to the action, the court has now power, on motion, to allow a continuance of the action by or against his representatives.

The supplemental complaint contemplated by section 121 of the Code, as a substitute for a bill of revivor, is served as a matter of right; and upon such complaint, and the pleading of the adverse party, the propriety of allowing a continuance of the original action is the only question in controversy, and is to be tried like any other issue.

Appeal from an order denying leave to file and serve a supplemental complaint.

The respondent was the executor of Charles W. Dayton, now deceased. Charles E. Borsdorff and Hermann Winter, appellants, obtained a judgment in this court on February 9, 1861, against Charles W. Dayton, then deceased.

Such judgment was vacated February 16, 1863, upon the application of the executor. The motion is reported, *sub nom.* Borsdorff *a.* Dayton, Ante, 36, *note.* Plaintiff's attorney afterwards procured an order, directed to the executor, to show cause in April, 1863, why an order should not be entered, giving the appellants leave to continue the action against Samuel Lord, executor of the last will and testament of Charles W. Dayton, deceased, by filing and serving a supplemental complaint. The motion was denied, and the petitioner appealed.

Robert H. Corbett, for the appellants.—I. The order is against a clear statutory right. It allows the executor to plead the Statute of Limitations, in the event of a suit against him on the original demand, and is an appealable order. (St. John *a.* Croel, 10 *How. Pr.*, 253; Whitney *a.* Waterman, 4 *Ib.*, 313; Otis *a.* Ross, 8 *Ib.*, 193; Greene *a.* Bates, 7 *Ib.*, 297; Harrington *a.* Slade, 22 *Barb.*, 161; *Code*, § 349, subd. 3 and 5.)

II. The application was regularly made. (*Code*, § 121.) Petition for leave is the proper proceeding, after the lapse of one year. (Greene *a.* Bates, 7 *How. Pr.*, 296; 15 *Ib.*, 241.)

III. The judgment was allowed to stand undisturbed for a period of nearly two years, before the executor moved to set it aside. After the judgment was set aside and vacated, the service of the summons and complaint still remained good. The defendant was dead. No valid objection can exist against allowing the action to be continued in the name of the executor, as the legal representative of said decedent. (*Code*, § 121.) The original service remains in force. (Bryan *a.* Casey, 2 *Abbotts' Pr.*, 416; *Code*, § 99.)

IV. If the order at special term is affirmed, the appellants will have no remedy by which to collect their claim out of the estate of the decedent. Because, in an action against the executor, or against the legal representatives of the defendant Dayton, the plea of the Statute of Limitations would be a bar to a recovery.

V. There was no necessity for an application within one year. 1. There was no suit pending. Judgment had been obtained in February, 1861. 2. This judgment was not vacated until February, 1863. 3. The action had not abated, even if the judgment was then regularly vacated. 4. And the application to renew was made less than two months after the judgment was vacated. Appellants' application, on which the order appealed from was made, was not a motion; it was by petition, for leave to serve and file a supplemental complaint. (Coon *a.* Knapp, 13 *How. Pr.*, 175; Gordon *a.* Sterling, *Ib.*, 405; Johnson *a.* Williams, 2 *Abbotts' Pr.*, 229.)

VI. It is a sufficient excuse that the application to revive was not made before, when it is shown that the claim was in judgment for nearly two years after the death of Dayton, before the same was vacated by his executor.

William R. Stafford, for the respondent.—I. The application to the court below was to the discretion of the court, and its denial furnishes no ground of appeal.

II. The court would never exercise that discretion in favor of continuing an action, as to the commencement of which there was doubt. If the suit was not in fact commenced, it could not be continued; to authorize its revival, there should be no question on this point.

III. The motion to revive should have been made within one year after the death of defendant. The right to continue is lost; all the court could do after the year, is (when it has been properly revived) to allow a supplemental complaint, and that only when no laches is shown. (*Code*, § 121; Coon *a.* Knapp, 13 *How. Pr.*, 175; Greene *a.* Bates, 7 *Ib.*, 296.)

IV. The application to continue can only be made by the real parties in interest. (St. John *a.* Croel, 10 *How. Pr.*, 253.)

V. The plaintiffs had their election in October, 1862, either to revive and continue this action, or proceed under the statute,

by a reference of their claim against the executor. Their laches in moving, being unexplained, would of itself be a bar to the motion. And as more than one special term had elapsed since the necessity of reviving was brought home to them, upon this ground alone the court below properly denied their motion. (13 *How. Pr.*, 177.)

VI. The plaintiffs availed themselves of their right to proceed under the statute, by a reference of the claim against the executor; which reference was pending when this motion was made. Such a reference is clearly an action in this court. (2 *Rev. Stat.*, 274, §§ 41 and 42; *Ib.*, 89, §§ 36, 37, 4 ed.) The plea of "another action pending" would bar this suit; its revival, therefore, would be nugatory.

Barnard, J.—The notice of motion in this case is for an order giving leave to plaintiff to continue the action against the executor of the deceased defendant, by filing a supplemental complaint. The motion was not made till after the expiration of a year subsequent to the death, and was denied at special term.

From the notice, it is evident that the motion was, in effect, a motion to be allowed to continue the action. Such a motion cannot be entertained after the expiration of a year from the death. (*Code*, § 121.)

It is claimed, however, that, in this case, the fact of judgment having been entered against the defendant, and subsequently set aside on the ground that it was entered after defendant's death, either prevented the year from commencing to run till after the judgment was set aside, or formed an excuse for not making a motion during that period. The section, however, is absolute and peremptory, that the motion must be made within a year after the death. The language of the section, so far as this is concerned, is clear, explicit, and unambiguous. There is no rule by which the court can construe this language into authority to deduct, out of the period which may have elapsed between the death and the motion, any portion thereof for any cause whatever; or to say that the year shall begin to run from any period other than that of the death of the party, or to allow of any excuse for not making the motion within the year.

But regarding the motion as one simply for leave to file a supplemental complaint to continue the action, the question arises, whether in that view it is necessary or proper to apply to the court for leave to file a supplemental complaint.

The appellant contends that it is necessary to make such application; and in support of his position, cites Greene *a.* Bates (7 *How. Pr.*, 296); Chapman *a.* Foster (15 *Ib.*, 241); Coon *a.* Knapp (13 *Ib.*, 175); Gordon *a.* Sterling (*Ib.*, 405); Johnson *a.* Williams (2 *Abbotts' Pr.* 229).

In the cases of Coon *a.* Knapp and Gordon *a.* Sterling, no question was raised as to the practice to be pursued in filing a supplemental complaint under section 121, and the opinions of the court do not in the slightest degree touch on the practice to be pursued in such case.

The case of Chapman *a.* Foster was a motion made by the defendant Foster to dismiss the complaint, because the plaintiff had not revived the action against the representatives of a deceased co-defendant.

This motion only raised the question whether the defendant Foster had a right to make such motion. The court held he had.

In the course of the opinion, the court, incidentally, say the plaintiff, must obtain leave to file a supplemental complaint on a motion made for that purpose. This point, however, was not before the court for decision, nor was it necessary for the decision of the case. It is a mere *obiter dictum*, and was evidently made without any consideration of the point.

The case of Greene *a.* Bates appears also to be a case where defendant moved to dismiss the complaint, because the representatives of a deceased plaintiff had failed to continue the action.

In this case, the only questions were, whether a defendant could make such a motion, or whether he could move to revive the suit by making parties the representatives of the deceased party. The court held that he could do neither; but that the course to be pursued in such case, was to have an order entered requiring the plaintiff, in case of the death of a defendant—or the representatives of the plaintiff, in case of the death of the plaintiff—to file a supplemental complaint of revivor within a certain

specified time, or that in default thereof the complaint be dismissed.

The judge, in his opinion, says: "It is true, the time has gone by when an order continuing the suit may be made, but it may be made on an application, and leave obtained, to file a supplemental complaint." The judge then proceeds:

"The Code is entirely silent as to the practice to be pursued in such a case, when the suit has been suspended over a year after the death of the party, except that it must be continued on a supplemental complaint, when the plaintiff applies to continue it after the year has gone by. I am of opinion, however, that we must regard the former practice in chancery as furnishing the mode of proceeding in such case."

It is evident that when the judge spoke of making application, and obtaining leave to file a supplemental complaint, his attention had not been drawn to the former chancery practice on the subject, nor to a due consideration of the practice now to be pursued in such case.

The cases of Johnson *a.* Williams—Williams *a.* Johnson, were cross-suits, and it was held at the special term of this district, that "from the language of section 121, it is evident that the permission of the court, on motion to continue the action, must be obtained, whether the continuance of it is sought within or after the expiration of the year."

The language of this section, however, in our view, clearly establishes two modes of proceeding—one by motion, and one by supplemental complaint. It says within a year, the court, on motion: after a year, on supplemental complaint. This is a clear antithesis.

The language is not, that within a year the court may, on motion, allow a continuance; and after a year may, on motion, allow a supplemental complaint to be filed; but it is that, after a year, the court, on a supplemental complaint, may allow, etc. This does not authorize the court to entertain a motion for leave to file a supplemental complaint, nor does it require such motion to be made. The plaintiff has as clear a right to present his supplemental complaint without asking leave of the court to do so, as he has to make a motion within the year, without previously obtaining leave so to do. Neither in the one case does the making the motion, nor in the other the presenting of

the supplemental complaint, revive the action of itself; the order of the court to that effect must be obtained.

The mode of obtaining such order under this section, within the year, is clear. It can be done on motion; or, in other words, the plaintiff can make a motion for the order, and if the court, on hearing both sides, sees proper to continue the action, it grants the order, the same as on any other motion: but after the expiration of the year, the section does not permit a motion; for when it says the motion may be made within one year, it is a clear exclusion of authority to make it after that time. To say that the court may, after the year, allow the action to be continued on a motion made upon a supplemental complaint, would be to ignore the section, and to allow an action to be continued on motion after the year; for it is manifest that it makes no difference what name is given to the papers on which the motion is founded, whether it is called affidavit, petition, or complaint,—the substance being the same, it is still but a motion; and the relief obtained is obtained in the same manner, and by the same proceedings, as the relief is obtained on an ordinary motion made on affidavit. It has already been observed, that the language of the section, neither by its express terms, nor by any reasonable construction, authorizes or requires a motion for leave to file a supplemental complaint or revivor.

Thus then we see that, so far as the language of the section is concerned, neither a motion to continue, nor a motion for leave to file a supplemental complaint, is authorized or required after the expiration of the year.

But it will be asked, how is the court to allow an action to be continued on supplemental complaint after the year?

By reference to the law and practice, as it stood prior to the Code, and to different modes of proceeding on motion, and on bills of revivor, which were well understood and recognized at the time of the passage of the Code, the answer to this question is plain.

Prior to the Code, there were known in the equity practice two modes of proceeding to revive a suit: one under the Revised Statutes, in the cases provided for by it, by summary application founded on petition or affidavit; and one by filing a bill of revivor.

The revivor on motion, under section 121, although it has a

wider range as to the cases in which it is applicable and necessary, and has a more limited period within which the motion can be made, still, in effect, stands in the place of this summary application, and the supplemental complaint stands in the place of a bill of revivor.

Again: a proceeding by motion was always understood as a summary application, on notice to the opposite party, founded on petition or affidavit for the relief granted—which application was opposed on affidavits, setting forth, substantially, the grounds of opposition; whereas a proceeding by a bill of revivor was in the nature of an action in which the defendant set up his objections to a revivor by demurrer, plea, or answer; and the issue made by the bill, demurrer, plea, or answer was heard and decided as solemnly as any other issue joined.

There can be no question but the word "complaint," as used in section 121, is used as synonymous with the old terms of "bill" and "declaration."

Construing this section, then, by the light of the practice formerly existing, and the then acknowledged distinction between proceeding by "motion" and by "bill," the result follows, that the practice upon proceeding by supplemental complaint, under this section, is the same as obtained formerly upon a bill of revivor, since the Code contains no provisions either regulating the practice on such a complaint, or inconsistent with the former practice on bills of this character.

Now, as the law stood prior to the Code, it was not necessary to obtain leave of the court to file a bill of revivor. (2 *Barb. Ch. Pr.*, 48; 3 *Paige*, 206.)

Indeed, a motion for such leave would be supererogatory. The object of filing the complaint, is to bring into court the parties against whom the suit is to be revived: if they did not contest the propriety of the revival, an order of revival was entered of course, *pro confesso;* but if they did litigate, then they presented their objections by demurrer, plea, or answer, forming an issue which was tried and disposed of in the regular way.

This being the object and course of proceeding on a bill of revivor, the court certainly would not, on a motion for leave to file such a bill, hear any objections to the filing of the bill, for that would be to prejudge the issue to be tried; and unless

they did hear such objections, a motion would be of no practical use. It was therefore settled that it was not necessary to obtain leave to file such a bill.

The framers of the section in question, certainly, did not intend to allow an action to be revived on summary application, irrespective of the time when such application should be made. If such had been their intention, they would have left out all that is said about supplemental complaint.

Yet the construction contended for by respondent would make such to be their intention, since it is obvious that the application is equally summary if made on a motion founded on a paper called a supplemental complaint, as if made on a paper called a petition or an affidavit. A substantial difference was intended, and not a mere difference of nomenclature.

The framers of the section, no doubt, had in view the old distinction of proceeding by motion, and by bill or revivor, and meant to adopt it.

Thus, then, we see that neither by the section itself, nor by the practice as it existed before the Code, was a motion for leave to file a bill of revivor necessary or proper.

The order below must be affirmed, with costs of appeal.

Sutherland, P. J., concurred.

Clerke, J.—I still adhere to the view taken by me in Johnson *a.* Williams (2 *Abbotts' Pr.*, 229). I think the codifiers intended to alter the practice of the Court of Chancery in this respect, and that the party should obtain the permission of the court before he continued his action by a supplemental complaint. There is, no doubt, a want of accuracy in the language employed, but I think it meant that within the year the court may, on a motion founded on an affidavit, allow the action to be continued; and after the expiration of the year, on a motion founded on the intended supplemental complaint. The permission of the court first seems to be indispensable, from the whole tenor of the section; and if this is so, the above interpretation is the only one consistent with such an intention.

Order affirmed.

LEIGHTON *a.* WOOD.

Supreme Court, First District; General Term, Dec., 1863.

EXCUSING DEFAULT.—TERMS.—APPEAL.

The settled power of the court to set aside inquests, and to open defaults in its discretion, for the purpose of attaining justice by a fair trial, may be exercised even after open and confessed negligence.

An inquest should be set aside, unless the court can be fully satisfied that the defendant had no evidence which would materially reduce or defeat the recovery.

On appeal from an order proper to be granted only as a matter of favor, the court at general term, in support of the order, will presume, till the contrary appear, that it was so granted.

Appeal from order setting aside inquests.

Four actions were brought,—one by Lorenzo D. Leighton against Fernando Wood, the three others by William MacDonald, William Van Tassel, and Edward Weylen, against the same defendant,—to recover damages for personal injuries sustained by the plaintiffs, policemen of the Metropolitan Police, distinct from a body of men known as the Municipal Police, acting, as it was averred, under the orders of the defendant. These causes were on the calendar in June, 1862, when they were reserved generally. On December 3, they were put upon the calendar, by a written consent of the attorneys for both parties, for Thursday, December 4. On Thursday, they were called in their order, and postponed, at the request of the defendant's counsel, to the following Monday, on the ground that he was engaged in the Superior Court; and so, from day to day, till Thursday, when the causes were again called. The defendant's counsel, or some one in his behalf, stated that he would conclude his engagement during the day, and suggested that they go over to the next morning on that account, but the plaintiff's counsel said he preferred to wait in court till the engagement should be terminated; and the court accordingly held them till that time. At about two o'clock the defendant's counsel, having finished his engagement, appeared in court, and then stated that he desired to move a postponement, and had sent for his client, to

make an affidavit. The court waited for nearly an hour, when the affidavit arrived, and the defendant's counsel read it, and moved a postponement. The affidavit stated that the defendant hoped and expected that a settlement of the cause might be made, and likewise, that four material witnesses were absent at the war. A trial of a precisely similar case, between another plaintiff and the same defendant, had been had at great length before, and all these four witnesses were then examined. The plaintiff's attorney then stipulated to read their testimony. This, the court said, obviated the necessity for an adjournment, unless it was alleged that it was expected to prove new facts by the witnesses. This was not alleged. The court held, that the prospect of a settlement was no excuse, and directed the causes to proceed.

The next morning plaintiff's counsel appeared with his witnesses. The defendant's counsel again moved to postpone, when the court said that matter had been settled the day before, and the causes must proceed. While a jury was being called, the defendant's counsel served upon the plaintiff's counsel an affidavit of the defendant, stating that he desired a commission to examine General Sickles and General Viele, at Norfolk and Fredericksburg, with an *ex-parte* order granted by a justice at chambers, to show cause the following Monday why a commission should not issue, and a stay of all the plaintiff's proceedings meantime. The court observed, in the hearing of defendant's counsel, that the stay was invalid, that he should disregard it, and directed the plaintiff's counsel to proceed with the trial, but subsequently adjourned the trial till the ensuing Monday, and, after admonishing the jury, directed them to return on Monday morning.

The stay was at once vacated by the justice who granted it. All these facts were known to defendant's counsel within a few minutes. They were known to defendant that day or the next. Formal notice of them was given to defendant's attorneys on Saturday. On Monday inquests were taken, resulting in a verdict of $4,000 in each case. On Tuesday defendant gave notice of motion to set aside the inquests, on the following grounds: That a jury in the first-entitled cause was impannelled while the proceedings therein were stayed; and that after said jury was so impannelled, a portion thereof was discharged,

and other jurors called in their places; and that as to the three other causes, that the said causes were tried on the testimony taken in the other cause, and not in either of them, and that in none of said causes was proclamation made according to law; and if said motion is denied upon the ground of said irregularities, then that the said motion may be granted for favor, on the grounds set out in the papers upon which this motion is made; or for such further or other order in the premises as may be just.

The motion was granted at chambers, with $10 costs in each case. The plaintiffs severally appealed.

David Dudley Field, for the appellants.—I. The orders are appealable. (*Code*, § 349, subd. 2 and 3; Union Bank *a.* Mott, 11 *Abbotts' Pr.*, 42; S. C., 19 *How. Pr.*, 267; Beach *a.* Fulton Bank, 2 *Wend.*, 225, 239; see Rogers *a.* Paterson, 4 *Paige*, 450.)

II. The ground, that three of the cases were heard on the testimony taken in the others is untenable, because the court, on a motion to open an inquest, cannot look into the testimony taken thereon. If the testimony is insufficient, the remedy is by appeal. (Mayor, &c., of N. Y., *a.* Hyatt, 3 *E. D. Smith*, 156, 165; Hollis *a.* Richardson, 13 *Gray*, 392; Wilkinson *a.* Tiffany, 4 *Abbotts' Pr.*, 98.)

III. The ground, that no proclamation was made "according to law," is untenable, because, in the absence of proof, it is supposed that every thing was done regularly. (*Brown's Leg. Max.*, 423.) The clerk's minutes likewise show the defendant was called by the crier and did not appear. There is no law, rule, or practice requiring proclamation to be made on the defendant to be called.

IV. The ground, that the default should be opened as matter of favor, addresses itself to the discretion of the court; and if ever there was a case that did not call for the interference of the court, this is one.

V. Not one of the various excuses, even taking them as they appear in defendant's papers, has ever been received as a reason for opening a default. 1. He does not disclose his defence. A simple affidavit of merits is insufficient, and he gives nothing more. (Fowler *a.* Colyer, 2 *E. D. Smith*, 125; Armstrong *a.* Craig, 18 *Barb.*, 387; Winship *a.* Jewett, 1 *Barb. Ch.*, 173; McGaffigan *a.* Jenkins, 1 *Barb.*, 31; Ferrussac *a.*

Thorn, 1 *Ib.*, 42.) 2. He does not show surprise. (Armstrong *a.* Craig, 18 *Barb.*, 387; Am. Ins. Co. *a.* Oakley, 9 *Paige*, 496.) 3. He gives no valid, legal, or efficient excuse whatever.

VI. As to the question of opening the default for favor. The discretion of the court in this respect is not unlimited. There are certain rules which govern the exercise of it. 1. In earlier times, a default was never excused except for most substantial reasons,—the imprisonment or infancy of the party, the death of his attorney, floods, storms, and the like. (*Co. Litt.*, 259, b.) 2. But this strictness has been with justice relaxed, and now, for less cause, a default may be excused and opened, though never, even now, without substantial reason. If the proceedings upon the default have been irregular, it matters, indeed, nothing whether the defendant's application be meritorious or not. But where the default has been regularly taken, substantial and sufficient excuse must be shown. In other words, the court will never interfere to take off a default out of pure favor. Thus, with manifest justice, it opens default on account of the sickness of the attorney (Wilmarth *a.* Gatfield, 1 *How. Pr.*, 50); detention by adverse winds (People *a.* Freer, 1 *Cai.*, 394; S. C., *Col. & C. Cas.*, 293); evident mistake (Cogswell *a.* Vanderberg, 1 *Cai.*, 156; Thompson *a.* Paine, 3 *Ib.*, 88; Gardinier *a.* Crocker, *Ib.*, 139); delay from accident (Olney *a.* Bacon, *Ib.*, 132); oppressive and overreaching practice (Smith *a.* Bowen, 2 *Wend.*, 245); surprise (Bosher *a.* Harris, 1 *How. Pr.*, 206); engagement of counsel in another court (Fowler *a.* Hay, *Ib.*, 38); negligence of an attorney, provided that the client has no adequate remedy against him (Meacham *a.* Dudley, 6 *Wend.*, 514; Denton *a.* Noyes, 6 *Johns.*, 296). So, a default in an action for a penalty under a municipal ordinance has been set aside, where, at the time it was taken, the defendant had a petition pending for relief. (Mayor, &c., of N. Y. *a.* Sands, 2 *Cai.*, 378; S. C., *Col. & C. Cas.*, 420.) So, it has been admitted as a valid excuse, that the default was entered contrary to a verbal agreement between the attorneys in the cause. (Wager *a.* Stickles, 3 *Paige*, 407.) 3. But the courts have refused to open inquests taken upon regular defaults, where the attorney suffered the inquest to be taken supposing there was to be no defence. (Crammond *a.* Roosevelt, 2 *Johns.*, 282.) So, where the cause was on the day-calendar, and the de-

fendant's counsel in court, but the defendant himself and his witnesses absent, and no cause shown for their absence. (Post *a.* Wright, *Col. & C. Cas.*, 183.) So, on a motion to set aside a default on the ground that the defendant had merits, and that the plaintiff had not lost a trial, the court said, that though where a party swears to merits, the court would strongly incline to let him in, yet that he must be able to suggest some excuse, such as inadvertence or accident. (Edwards *a.* McKinstry, *Col. & C. Cas.*, 125; Spencer *a.* Webb, 1 *Cai.*, 118.) And even where the inquest was taken upon a defective notice of trial, the court denied the motion to open, where it appeared that the defendant had not been misled. (N. Y. Central Ins. Co. *a.* Kelsey, 13 *How. Pr.*, 535.)

Beebe, Dean & Donohue, for the respondent.

Leonard, J.—In this action, and three others, against the same defendant, in favor of different plaintiffs, verdicts were obtained at the circuit, by default, against the defendant for $4,000 damages in each case. The counsel for the defendant had been in court and moved to postpone the trial, on the ground that he was unable to procure the attendance of witnesses, many of them being absent from the State, they being very numerous; and the trial being brought on unexpectedly, the defendant was unprepared, &c. The court, at circuit, had denied the application to postpone, and after the defendant had left the court, inquests were taken in each case.

Motions were subsequently made to set aside these inquests, at a special term, where, upon a full examination, the motions were granted.

The applications were made upon the ground of irregularity; and also, in case the motions should not prevail upon those grounds, for favor upon the facts disclosed.

The motions are now brought up on appeal from the orders setting aside the inquests, and letting the defendant in to defend the actions, and restoring them to the calendar for trial.

The plaintiffs insist that they have obtained an absolute right, by the verdicts so obtained, with which it is not in the power of this court to interfere, except upon the ground of irregularity.

I do not so understand the practice. The practice has been long well settled that it was in the discretion of the court to set aside inquests and open defaults, for the purpose of attaining justice by a fair trial, when it appeared that the defaulting party had a good and substantial defence upon the merits, or that such defence probably existed, to the whole or some part of the action.

Such relief is often granted, even against the open and confessed negligence of the defaulting party, or of his attorney or counsel.

The plaintiff can claim no actual right to hold an unjust verdict, whether the whole amount of the verdict is involved or only some part of it.

It would be a mockery of justice to hold a verdict, obtained without a hearing of the case for the defence, where the court could not be fully satisfied that the defendant had no evidence that would materially reduce the verdict or wholly defeat the action. The relief asked for in such cases is usually granted upon terms of compelling the defaulting party to repair the damages which his default has occasioned to the other side, by paying the costs of the term which has been lost, of the inquest, and of opposing the motion to open the default. And where the defendant is in such pecuniary circumstances as to endanger the recovery, the additional condition is imposed, of permitting the verdict to stand and execution to issue as security. No substantial right of the plaintiff is interfered with. His cause of action remains. He can still pursue his remedy, bring his cause to trial, and obtain his verdict, if his proof will warrant a recovery; and if it will not, certainly it would be a reproach to the administration of justice to permit a recovery by default, even after negligence on the part of the defendant in preparing his cause for trial.

The discretion of the court in denying such an application, and the severity of the terms liable to be imposed, is a sufficient protection against the unnecessary or repeated occurrence of defaults.

Orders of this description are discretionary, and are not subject to review upon appeal. But were we to look into the merits of the application, considering the nature of the action, the amount of the recovery, the number of witnesses required,

and the shortness of the time left to procure them after the learned judge who presided at the circuit had decided that he would not postpone the trial, it would be impossible to arrive at any different conclusion from that of the judge who vacated the inquests, or to doubt the soundness of the legal discretion which directed the orders now appealed from.

It does not appear from the face of these orders whether the motions were granted upon the ground of favor, or of irregularity in the proceedings.

We are bound to presume that the orders were granted for favor, inasmuch as we can find no irregularity; and the orders ought to have been granted for the former reason.

It is not claimed that the defendant is not well able to respond for any recovery which the plaintiffs may obtain.

The order should have been granted on the condition of the defendant paying the costs of the term of the inquest, and of opposing the motion. That part of the order directing the plaintiff to pay the costs of the motion should be submitted to the judge who heard the motion for resettlement, and the terms above indicated should be imposed upon the defendant.

It is but just to mention, that the learned judge who heard the motions at special term, states that the order was settled in this form, as to costs, through inadvertence—the motion having been in fact decided differently in respect to the costs.

The orders appealed from are in all other respects affirmed, without costs.

Sutherland, P. J., concurred.

Barnard, J., expressed no opinion.

WATTSON *a.* THIBOU

Supreme Court, First District; General Term, Dec., 1863.

SUPPLEMENTAL COMPLAINT.—NEW CAUSE OF ACTION.

A new substantive cause of action cannot be set up by supplemental complaint.

The matter of a supplemental complaint must be consistent with and in aid of the case made by the original complaint.

In an action upon notes, after answer that the notes had been paid by the acceptance of defendant's bonds in satisfaction,—*Held,* that it was improper to allow a supplemental complaint, setting forth such bonds, and claiming a recovery upon them.

A plaintiff cannot be permitted to recover judgment upon a cause of action not in existence at the commencement of his action.

Appeal from an order denying leave to serve a supplemental complaint.

This action was brought by Thomas B. Wattson and Edward L. Clark against Thomas Thibou, upon nine promissory notes, amounting to $17,723.34. The complaint was verified 12th August, 1861: an attachment was issued and summons served by publication: an answer was put in February 21st, 1862, setting forth that on September 10th, 1861, the defendant delivered to plaintiff four bonds, amounting to £3,692 7*s.* 3*d.*, which the latter accepted in full satisfaction.

The plaintiff moved for leave to set up, by supplemental complaint, that the bonds were given to their agent at Antigua, after the commencement of the action, in fraud of the plaintiffs, with other facts which sufficiently appear from the opinion; and also, that four judgments had been entered in Antigua, upon warrants of attorney, accompanying such bonds, and asked leave to set up such bonds and judgments by way of supplemental complaint.

The motion was denied, and plaintiff appealed.

Joseph E. Berry, for the appellants, cited *Code*, § 177; Lampson *a.* McQueen (15 *How. Pr.*, 345); Bate *a.* Fellowes (4 *Bosw.*, 638); Hasbrouck *a.* Shuster (4 *Barb.*, 285); Drought

a. Curtiss (8 *How. Pr.*, 56); Burdell *a.* Burdell (2 *Barb.*, 473); Hoyt *a.* Sheldon (4 *Abbotts' Pr.*, 59); affirmed, 19 *N. Y.*, 207; McCullough *a.* Colby (4 *Bosw.*, 603); and urged that the matters set up in answer arose in a fraudulent attempt of defendant to avoid a successful attachment in the action.

Henry A. Cram, for the respondent.—A supplemental complaint can be allowed only when it sets up facts material to the plaintiff's case. (*Code*, § 177.) The facts shown, are: 1. That when the answer was put in, the plaintiff's cause of action was merged in the bonds; 2. That there was a second merger by the judgments. Instead of showing any thing material to the plaintiff, the supplemental complaint shows that no cause of action existed at the time the action was commenced.

Barnard, J.—The principles that obtained prior to the passage of the Code, in reference to the filing of a supplemental bill to bring in matters occurring subsequent to the filing of the original bill, still continue, except when either expressly abrogated by, or manifestly inconsistent with, the provisions of the Code.

One of these former principles is, that a new substantive cause of action cannot be set up by supplemental bill. (Milner *a.* Milner, 2 *Edw.*, 114.)

It was another of those principles, that the matter of the supplemental bill should be consistent with and in aid of the case, made by the original bill, and not to make a new and different case. (1 *Hoff. Ch. Pr.*, 396.)

These principles are not inconsistent with, nor abrogated by section 177 of the Code.

Now in this action, the original complaint counted on promissory notes.

The supplemental complaint sets up no facts that are material to or in aid of the cause of action on the notes.

Taking the 8th, 9th, 10th, 11th, and 12th allegations of the proposed supplemental complaint by themselves, without reference to the other allegations, and they simply show a cause of action on the English judgments, which is a cause of action arising since the commencement of this action, and are not material to or in aid of the cause of action on the notes.

Again, taking all the allegations of the proposed supplemental complaint together as a whole, it appears that the object sought to be obtained by the supplemental complaint, is to avoid the effect of the answer to the original complaint on the notes, which answer sets up that on the 10th day of September, 1861 (which was after the commencement of this action), the defendant made, sealed, and delivered to plaintiffs his four bonds, which bonds plaintiffs accepted, and received in full satisfaction of the notes.

This answer tenders the issue as to whether plaintiffs did accept such bonds in such manner as to bar their right of action on the notes;—upon which issue plaintiffs can, in disproof of the answer, introduce all the evidence and proof which he could under a supplemental bill, setting out facts to show that there was no such acceptance. If such issue be found in plaintiffs' favor, then they recover on the notes.

But if, notwithstanding all the proofs and facts advanced by the plaintiffs, it should be decided that they did accept the bonds in such manner as to bar their right of action on the notes, then there is no principle upon which, either by supplemental complaint or otherwise, the plaintiffs can maintain the present action, brought upon promissory notes, by turning it into an action on bonds received, or on judgments recovered on such bonds, long after the commencement of the action.

The plaintiffs, by their proposed supplemental complaint, seek to place themselves in the double attitude—firstly, of contending that they have not accepted the bonds alleged in the answer, in such manner as to bar the action on the notes; and secondly, failing in that, to contend that they have accepted them so far as to enable them to recover judgment on them in this action.

This they cannot be permitted to do.

It may be that, in the event of its being decided that plaintiffs have accepted the bonds so as to bar their right of action on the notes, they will lose the benefit of their attachment, unless they are allowed to recover in this action upon the bonds or the judgment recovered thereon, as substantive causes of action; and it may also be, that such a result would work great hardship in this particular case.

But notwithstanding that, a plaintiff cannot be permitted to

recover judgment on a cause of action not in existence at the time he commenced his action.

Order affirmed, with costs.

SUTHERLAND, P. J., and CLERKE, J., concurred.

TAMISIER *a.* CASSARD.

Supreme Court, First District; At Chambers, December, 1863.

FRIVOLOUS ANSWER.—REAL PARTY IN INTEREST.

An answer averring that plaintiff is not, but that A. B. is, the real party in interest in the action, is not frivolous.

Motion for judgment on an answer as frivolous.

This action was brought by Alfred Tamisier against Carolina Cassard and Andres Cassard, upon a promissory note for $263.81. The complaint alleged that it was indorsed by the payee to the plaintiff, and that he was the lawful owner and holder. The defendants answered, denying that the plaintiff was the owner and holder of the note, and averring that one Victor Giraudy was the real owner and holder thereof, and the real party in interest. Plaintiff moved for judgment on this answer as frivolous.

Francis H. Dykers, for the motion.—I. This answer is clearly frivolous. (Brown *a.* Ryckman, 12 *How. Pr.*, 313; Witherspoon *a.* Van Dolar, 15 *Ib.*, 266; Gilbert *a.* Covell, 16 *Ib.*, 34; Higgins *a.* Freeman, 2 *Duer*, 650; Flammer *a.* Kline, 9 *How. Pr.*, 216.)

II. The complaint, even if the allegation "that the plaintiff is the lawful owner and holder" was left out, would be sufficient. The answer creates no issue.

William H. Meeks, opposed.—I. An answer which denies a material allegation cannot be struck out as frivolous. (Davis *a.* Potter, 4 *How. Pr.*, 155; S. C., 2 *Code R.*, 99; Temple *a.* Murray, 6 *How. Pr.*, 329.)

II. An entire answer cannot be struck out as frivolous: plaintiff must demur. (Hull *a.* Smith, 1 *Duer*, 649; S. C., 8 *How. Pr.*, 149.)

Leonard, J.—The Code directs that actions shall be prosecuted in the name of the real party in interest. (§ 111.)

The answer here alleges that one Victor Giraudy is the real party in interest in this action.

The plaintiff now moves for judgment, on account of the frivolousness of the answer.

The section above referred to makes it necessary that the plaintiff should be the real party in interest.

I cannot consider such an issue as frivolous. The plain direction of the Code must be disregarded, before the issue can be considered immaterial.

The motion is denied, without costs.

MUSSINA *a.* CLARK.

Supreme Court, First District; At Chambers, December, 1863.

Conspiracy.—Pleadings.—Scandalous and Irrelevant Allegations.

In an action for a conspiracy, the rule is to allow a great latitude in setting out in the complaint the particular acts from which the conspiracy is to be inferred, even so far as to allow the individual acts of the conspirators to be averred.

So far as the allegations of such acts are scandalous, they should be stricken out, unless they appear to relate to the foundation of the plaintiff's action.

Instances of scandalous and irrelevant matter in a complaint in an action for conspiracy.

Motion to strike out complaint as scandalous, or to strike out portions of it as scandalous, irrelevant, and redundant, and to make it more definite and certain.

This action was brought by Simon Mussina and Jacob Mussina against Lot C. Clark and Alfred DeGroot, counsellors of the court, to recover $100,000 damages for an alleged con-

spiracy to delay and defeat the plaintiffs in an action brought by the present plaintiffs against Stillman. Belden & Alling, the present defendants have been in that action the attorneys for the defendants. That action was pending several years, and resulted in a judgment for the plaintiffs for about $90,000.

The plaintiffs now allege, in this action against the attorneys and counsel of the defendants in that action, that knowing there was no defence to it on the merits, they nevertheless obtained, on false affidavits, nearly a year's time, after the service of the original complaint, for the defendants to make answer to it: that the defendants being finally ordered by the court to answer the complaint in ten days, they, the counsel and attorney, interposed a demurrer, well knowing that it was not done in good faith, and could not be sustained, but was merely for the purpose of delay: that after the decision of the demurrer against the defendants, answers were put in, drawn by one of the present defendants, who acted as counsel, and sworn to by the other, who acted as attorney, when they both well knew that the answers were false, or did not know them to be true: that more than a year after the original answers were thus put in, a motion was made for leave to file an amended answer for two of the defendants, sworn to by the attorney, upon an affidavit of such attorney that all the defendants in the action resided out of the State, when the attorney knew that one of the defendants named in the amended answer resided in the city of New York, and that such amended answer was designed to add known falsehoods to those contained in the original answer.

Many other acts are also alleged to have been done by these defendants during the progress of said action, in furtherance of the conspiracy to delay and defeat the plaintiffs in the attainment of their rights.

The defendants moved to strike out the whole complaint as scandalous, with costs against the plaintiffs' attorney. Or, if that should not be granted, to strike out portions as scandalous, irrelevant, and redundant, and to make certain portions more certain.*

* The following extract from the complaint gives an idea of the portions objected to. The parts in italics were specially attacked by the motion:

The plaintiffs herein further show, [48, *that the said Lot C. Clark was informed, and knew, that so far as the said answer of Stillman and Belden, and the said answer of William*

Charles A. Rapallo, for the motion.—I. The complaint is scandalous.

II. It is a device to publish a libel under color of an action at law, when no real cause of action is shown by the complaint.

Alling in said action, took issue with the complaint therein, whether by special or general denial, or by attempted avoidance, they were untrue, false, and evasive, yet] that under the influence and inducements of said Clark, [39, *who drew the said answers*]. [40, *and substituted them in the place and stead of those drawn by him previous to the decision on said demurrer*], the said Alfred DeGroot [41, *reluctantly*] swore to said pretended answers, [42, *well knowing that he had no sufficient ground for believing them true, and*] without knowing or believing that they were true, and that the said Clark [43, *used his influence with and*] persuaded, and did induce the said DeGroot to make oath to said answers, well knowing that the affidavits of verification attached thereto were untrue, and counselled and consented to such verification of said answers; and that the said Clark did so, well knowing that he, said Clark, was thoroughly and perfectly informed of the facts in said case in said action, and that the said DeGroot was not, [44, *and that said pretended answers could not be sworn to by said defendants, or by himself as their informed attorney, without wilful and corrupt perjury.*

The plaintiffs herein further show, that on or about the 1st day of April, 1858, the said plaintiffs moved this court to set aside the answer of said Alling, and the answer of said Belden, in said action, on the ground of the improper and insufficient verification of the same; [45, *that upon the hearing of said motion, the said Clark used an affidavit made by him, said Clark, wherein he swore that J. L. Jernegan, Esq., then acting as the attorney for plaintiffs therein, had informed him, said Clark, before the said answers were served, that he, Jernegan, "did not care for the personal verification by the defendants, but would just as soon have the verification made by the attorney.*]" [46, *which statement the said Clark well knew to be untrue, he Clark, knowing that there was no agreement or understanding between him and said Jernegan about the said answers or their verification*]; [47, *that also in such affidavit, he, said Clark, further swore that "the said defendants have fully and fairly stated their case in the cause to deponent, who resides in Richmond county, and that each of said defendants has a good and substantial defence to this action,"* (id est, *to the said action*), "*on the merits, as he verily believes,*" *which statement the said Clark knew to be wholly or partially false;*] [48, *and that upon the hearing of said motion the said Clark also used an affidavit made by said DeGroot, drawn with the intent, and in such a manner as to induce this court to believe that he, said DeGroot, had examined "the papers and proceedings mentioned in such verifications," and "that they were either original or authenticated copies of the various deeds, pleadings, instruments, and proceedings, mentioned in said answers*]; " [48½, *when the said Clark and the said DeGroot both well knew that he, said DeGroot, had made no such examination of said deeds, pleadings, instruments, and proceedings, and did not believe said answers or said verifications to be true by reason of any such examination made by him, said DeGroot.*]

The plaintiffs herein further show to this court, that, in pursuance of [68, *the intent, view, and purpose hereinbefore stated, and in furtherance of the conspiracy hereinbefore set forth,*] [69, *and to fulfil the declaration of said Clark to others than the defendants therein, that said action would not come to trial, and that he would exhaust the plaintiffs by delay, though there was really no defence to the action on the merits, or words to that effect*], they, the defendants herein, Lot C. Clark and Alfred DeGroot, [70, *did continue by various false pretexts and pretences, and irregular movements and practices in said action, and by the in-*

III. The complaint is so stuffed with scandalous and irrelevant matter, that the court cannot, without great labor, separate the scandalous and irrelevant from the relevant and proper, if, indeed, there be any such relevant and proper matter in it.

IV. Even if it were possible, by imposing upon the court a critical, laborious, and extended examination of said complaint, to extract from it allegations which might constitute a cause of action, yet it is drawn with such entire disregard of the rules of pleading, and is so grossly improper, that it should be wholly set aside.

V. It pretends to set forth various causes of action, without stating them separately.

VI. The allegations of the complaint are so indefinite and uncertain, that the precise nature of the charge is not apparent.

VII. In case the complaint is not wholly stricken out, we ask that the objectionable portions may be stricken out as irrelevant, scandalous, and redundant, respectively, and that other portions indicated in the motion-papers be made more definite and certain.

Henry Woodruff, opposed.—We raise, as preliminary objections, 1. An entire complaint, that may contain only the elements of a cause of action, cannot, on any ground, be stricken out. (Benedict *a.* Dake, 6 *How. Pr.*, 352; Stiles *a.* Comstock, 9 *Ib.*, 48; Harlow *a.* Hamilton, 6 *Ib.*, 475.) 2. An alternative demand is not to be heard. (5 *Co.*, 40; Warwick *a.* Mayor, &c., of N. Y., 28 *Barb.*, 210; S. C., 7 *Abbotts' Pr.*, 265.) The Code does not authorize "alternating for the judgment of the court." (Durant *a.* Gardner, 10 *Abbotts' Pr.*, 445.) 3. That the "fifth" reason or ground stated in the motion is indefinite, in not stating the separate causes of action pretended to be set forth in the complaint. (Purdy *a.* Carpenter, 6 *How. Pr.*, 361.)

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terposition of untruthful answers and affidavits therein, which the said Lot C. Clark well knew to be untruthful and false, and which the said DeGroot did not know, and had no sufficient information or reason to believe to be true]. [71, *to hinder, delay, and embarrass the proceedings in said action, and defeat the due and speedy administration of justice therein*] till the trial of said action at the circuit of this court, about six years after the commencement of said action. [72, *when the counsel for the said defendants therein, Stillman, Belden, and Alling, repudiating the sworn answers, their specific and general denials, confessed to this court that "there are no issues of fact," "no questions of fact in the case," "altogether a question as to the proper view to be taken of undisputed facts.*]"

II. The complaint states a cause of action; it is an action upon the case in the nature of a conspiracy. (Skinner *a.* Gutton *et al.*, 1 *Saund.*, 230; Jones *a.* Baker, 7 *Cow.*, 445; Hutchins *a.* Hutchins, 7 *Hill*, 104.) The charge against DeGroot & Clark is stated. The statement of acts done, and of the knowledge, and of the facts showing the knowledge, support the charges. (Van Pelt *a.* McGraw, 4 *N. Y.* (4 *Comst.*), 110; People *a.* Fisher, 14 *Wend.*, 9, 16.) The action is maintainable at common law. (6 *T. R.*, 636; 2 *Greenl. Ev.*, 257, § 254; Swan *a.* Saddlemire, 8 *Wend.*, 676; Cockshall's Case, *Leonard*, 189, *a*, 269. See, also, Gregory *a.* Duke of Brunswick, 46 *Eng. Com. L.*, 204, 952.) It may also be brought under the statute of this State. (2 *Rev. Stat.*, 287, § 68; *Ib.*, 691, § 8, subd. 6.) Our statute is not a copy of the old statute of Edw. III., but has a wider scope, and gives to any party, injured by the deceit or conspiracy, a more perfect remedy.

III. The matters stated in the complaint are relevant to the cause and subject of the action. The plaintiffs may state facts, showing, 1. The inducement; 2. The conspiracy, and acts showing it; 3. The acts causing the damage; 4. The facts showing the damage; 5. Any facts that may affect the amount of the recovery; 6. Facts showing knowledge. (Carpenter *a.* West, 5 *How. Pr.*, 53; Moloney *a.* Dows, 15 *Ib.*, 261; Rochester City Bank *a.* Suydam, 5 *Ib.*, 216; Littlejohn *a.* Greeley, 13 *Abbotts' Pr.*, 311; S. C., 22 *How. Pr.*, 345.)

IV. What is not clearly irrelevant cannot be scandalous. (*Bouvier's Law Dict.*, "Scandal;" *Exp.* Simpson, 15 *Ves.*, 477; 4 *Cooper's Eq. Pl.*, 318; *Story's Eq. Pl.*, §§ 268–270; 12 *Young & Coll.*, *New R.*, 443.)

V. As the facts lie within the knowledge of the defendants, they are stated with sufficient certainty. (*Archbold's Civ. Pl.*, 110; 1 *Chit. Pl.*, 333; Hughes *a.* Smith, 5 *Johns.*, 168.)

VI. The plea of "privileged communications" is not a shield to the defendants in this action. (*Bouvier's Institutes*, 440; Greenough *a.* Gaskell, 1 *Myl. & Rev.*, 98; Coveney *a.* Tannahill, 1 *Hill*, 34.)

Ingraham, J.—In an action for a conspiracy, it is very difficult to limit the extent to which the plaintiff may go in his complaint, in setting out the fraudulent acts complained of.

The rule has been to allow a great latitude in setting out in the complaint the particular acts relied upon, from which the conspiracy is to be inferred, even so far as to allow the individual acts of the conspirators to be averred. This rule was distinctly stated by OAKLEY, J., in Tappan *a.* Powers (2 *Hall*, 277). He says: "It cannot be doubted that if the declaration had averred that all the defendants used the fraudulent means of obtaining plaintiff's property which were charged against one, that such an averment would be supported by proof that they were used in pursuance of a plan concerted among them all; and it seems to me equally clear . . . . the acts of each defendant may be stated to be done individually, and that such act is, in judgment of law, the act of all."

Many of the allegations, therefore, of the individual acts of the defendants, cannot be said to be irrelevant.

So far as they are scandalous they should be stricken out, unless it appears that they relate to the foundation of the plaintiff's action; but if they are acts from which the conspiracy may be proved, the plaintiff has a right to insert them in the complaint.

Judge Harris, in Williams *a.* Hayes (5 *How. Pr.*, 470), states the rule, as to striking out such matters, to be, "whether the allegation in question can be made the subject of a material issue." (See, also, 5 *How. Pr.*, 57, 219.)

Some of the allegations are moved to be stricken out, because they are scandalous, impertinent, irrelevant, or redundant. It cannot be of any use to discuss these different questions separately, but the application of the general rule to this motion has led me to the following conclusion, viz.:

The paragraphs, Nos. 1, 2, 3, 4, 7, 8, 9, 11, 12, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27, 28, 35, 36, 37, 38, 41, 42, 43, 44, 45, 46, 47, 48, 48½, 50, 51, 52, 53, 56, 57, 60, 62, 63, 64, 65, 66, 67, 69, 72, should be stricken out.

I entertain some doubt as to other portions of this complaint, but it may be proper to allow them to stand as connected with the general charge of conspiracy. If the whole complaint is so defective as not to make out a good cause of action, the remedy is by demurrer.

Motion to strike out the paragraphs numbered as above, granted; and denied as to the residue. Costs to abide the event.

BEEBE *a.* MARVIN.

New York Superior Court; General Term, Dec., 1863.

SHAM AND FALSE ANSWER.—EFFECT OF NOTICE OF TRIAL.—JUDGMENT OF SISTER STATE.

Serving a notice of trial is not a waiver of a motion previously noticed to strike out the answer in the cause as sham or false.

In an action upon a judgment recovered in a sister State, proof that the defendant appeared in the original action, and a certified copy of the judgment record, are, in the absence of affidavits on the part of the defendant, sufficient evidence of the falsity of an answer denying knowledge or information sufficient to form a belief as to the recovery of the judgment and the jurisdiction of the court which rendered it.

Appeal from an order striking out an answer as sham and false.

This action was brought by George M. Beebe against Walter K. Marvin on a judgment recovered in Kansas for $364. The complaint alleged the recovery of the judgment in Kansas; that the Kansas court had jurisdiction of the action and of the person of the defendant, and that the defendant appeared in the action there; that the judgment was unpaid, and due and owing, and that the defendant had been requested, and refused to pay it; and that judgment was therefore demanded in this suit, with interest and costs.

The defendant obtained some thirty or forty days additional time to answer, upon the allegation that he was absent from Kansas at the time of the alleged recovery of the judgment against him there, and that it was necessary that he should procure a certified copy of such judgment before answering, and that he had sent to Kansas for such copy of the judgment.

On May 8, 1863, the defendant answered by merely denying knowledge or information sufficient to form a belief of the truth of the facts alleged in the complaint.

A motion was made upon the pleadings, and upon an affidavit

of the plaintiff's attorney, stating that he had in his possession a duly exemplified copy of the record of the Kansas judgment; from which record it appeared that the defendant had appeared, by Charles Chadwick, his attorney, and answered in the action in Kansas, and that judgment was thereafter rendered in that action in favor of the plaintiff for $364.

Notice of the motion was served on the defendant's attorney in this suit on May 13, 1863.

On May 14, 1863, the plaintiff served on the defendant's attorney a notice of trial of the issue of facts in the causes, for the next June term of this court.

An order was made by Mr. Justice White, at Chambers, striking out the answer as sham and false. From this order the defendant appealed.

Miller, *Peet & Nichols*, for the appellant.

Edwards & Odell, for the respondent.—I. The motion, under § 152 of the Code, may be made at any time *before trial.* (Miln *a.* Vose, 4 *Sandf.*, 660.)

II. The motion was not waived by the notice of trial. The two proceedings were in no way inconsistent. Nor does the Code limit such a motion to those cases in which no notice of trial has been served. (Kellogg *a.* Baker, 15 *Abbotts' Pr.*, 286; Miln *a.* Vose, 4 *Sandf.*, 660.)

III. The defendant should be required to assign conclusive reasons in support of an objection so purely technical. The decision at special term was right upon the merits.

IV. When the matters alleged are necessarily or presumptively within the defendant's personal knowledge, he cannot deny sufficient knowledge or information. (*Voorhies' Code*, 7 ed., cases cited, p. 203; Richardson *a.* Wilson, 4 *Sandf.*, 708.)

V. Every legal presumption will be given in favor of, and to uphold such jurisdiction of the Kansas court. (Harrod *a.* Barretto, 1 *Hall*, 155.) And a defendant can give no evidence to disprove the presumption, unless he, in his answer, expressly denies such jurisdiction. (*Ib.*)

The allegation, therefore, stands admitted.

By the Court.*—Robertson, J.—The defendant appeared in the action in which the judgment sued on was recovered. He procured delay three times, in pleading in this action for order to have time to obtain a copy of the judgment. A certified copy of the judgment is produced, and his only answer is ignorance of all matters charged in the complaint. It is not enough in such case, where the presumption is of knowledge (1 *Voor. Code*, 7 ed., 203, cases cited; Richardson *a.* Wilton, 4 *Sandf.*, 708), simply to rest on ignorance. Every presumption is in favor of the jurisdiction of the court of Kansas (Harrod *a.* Barretto, 1 *Hall*, 155); and there was no error in the order striking out the answer for that reason. The plaintiff was not barred from making the motion by having noticed the issues for trial. He was entitled to the earliest disposition of a sham defence he could get. Kellogg *a.* Baker (15 *Abbotts' Pr.*, 286), is not against this view.

The order appealed from must be affirmed, with costs.

CAHILL *a.* PALMER.

Supreme Court, First District; General Term, December, 1863.

Irrelevant Matter.—Pleading.—Cause of Action.

Allegations which can in no aspect of the case made by a pleading be material, are irrelevant, and should be struck out on motion.

In pleading, the fact to be established by evidence must be averred, not the evidence itself. Illustrations of this rule.

An action will not lie against a municipal corporation to try irregularities in proceedings to take land for public use, and awarding the damages to another than the true owner. The proper remedy stated.

Appeal from an order striking out portions of the complaint as irrelevant.

This was an action by Sylvester Cahill and Gilliam B. Seely against Courtlandt Palmer and the Mayor, &c., of New York, to obtain a judgment for $73,040, awarded to Palmer by the

* Present, Robertson, White, and Barbour, JJ.

commissioners appointed to assess damages for certain lands acquired by the city of New York for a public park. The form of the complaint is sufficiently stated in the opinion. The averments stricken out were: that Palmer attended the commissioners "in the absence of the plaintiffs;" that the commissioners refused to give any information regarding the title of Palmer and his evidence; refused to allow plaintiffs to contest Palmer's title; and also, that court and counsel, on the confirmation of the commissioners' report, declared that "such confirmation would not prejudice plaintiffs' right to contest defendants' title to said land or premises, or to the money awarded." The plaintiffs appealed.

Anthony R. Dyett, for the appellants.—I. The Code, § 160, authorizes "irrelevant or redundant matter" to be stricken out, "on motion of any person aggrieved thereby." This is but a retention of the old chancery practice upon exceptions for irrelevancy, &c. (18 *How. Pr.*, 240.) It is the same as *impertinence* in chancery and *surplusage* at law (1 *Barb. Ch. Pr.*, 41, 101; *Steph. Pl.*, 422), and includes matter wholly foreign, or which does not require to be stated. This is neither. Formerly, redundant and irrelevant matter was stricken out in chancery, because costs went by the folio, and the defendant had to pay for it, and for his answer to it, perhaps. And now, if the matter be not *prolix*, and does not prejudice seriously the defendants, it will not be stricken out. (8 *How. Pr.*, 470.) This matter cannot harm the defendants, if irrelevant. If stricken out, and it be relevant, it may do us irreparable mischief.

II. If the matter be inadmissible in evidence, it is irrelevant —*e converso;* if admissible, it is not. (13 *How. Pr.*, 97; 1 *Barb. Ch. Pr.*, 202; 1 *Johns. Ch.*, 103.) But the rule in chancery was, that if the matter be admissible, even as affecting the question of costs, it should not be stricken out. (4 *Paige*, 174; 1 *Edw.*, 350.) Here it certainly may affect that question. This is a case in which costs are in the discretion of the court. And the matter never is stricken out where there is any doubt as to its relevancy. (6 *How. Pr.*, 355; 18 *Ib.*, 240.) Again, the matter asked to be stricken out mutilates the complaint, and makes its whole scope and meaning different from what it is. It alters the scheme or theory of the action, and makes the

plaintiffs allege a different state of facts, unfavorable to themselves. And again, it leaves what remains unintelligible and insensible.

III. A complaint may now, as well as formerly, be in a double aspect. We may be obliged in this case to urge our claim as a bill of review, upon equitable grounds. This is a familiar kind of bill, applicable to all cases, as well at law as in equity, and was once the only mode of obtaining a new trial, and is now in vogue where there is no other remedy; and we may be compelled, if the court decide the order of confirmation of the report to be final at law, to resort to this equitable remedy, and then these facts asked to be stricken out would form the essence of our action.

Ruggles & Felt, for the respondent.

Leonard, J.—This is an appeal from an order striking out portions of the complaint as irrelevant and redundant.

The action relates to moneys awarded to the defendant, Palmer, as the owner of certain lands taken for the Central Park, but which the plaintiffs claim to have owned; and that the award was erroneously made in favor of Palmer as the owner.

There are certain allegations in the complaint showing that the plaintiffs were not allowed to inspect the evidence of title produced by Palmer, and were not allowed a hearing before the commissioners of estimate and assessment, and that they demanded their rights, as they claimed them, in these respects There is also an allegation of what was said by the corporation counsel and by the court, on the motion to confirm the commissioners' report.

These allegations were stricken out, on motion, as irrelevant and redundant, and the plaintiffs now appeal from the order.

The whole complaint appears to be bad, unless the action can be understood as one to recover money which Palmer or the corporation of the city of New York have in hand for the lands alleged to belong to the plaintiffs, which have been condemned for public use under the statutes referred to in the complaint.

There is no allegation that the land has been taken for public

use by the city corporation without payment, nor that the defendant Palmer has received any money for the lands which the plaintiffs claim. There are no allegations of fraud or collusion against the defendants. The allegations appear to bring in question only the regularity of the proceedings of the commissioners, and of the court in confirming the report of the commissioners.

The commissioners were never authorized to settle conflicting titles to the lands to be taken. It is not in the nature of a bill for review.

It is difficult to see any theory upon which the complaint can be maintained. In such a case it is hardly worth our while to consider the several parts of such a complaint, or to strike therefrom any part of it; but it would be just as well to leave the defendants to their demurrer to the whole complaint.

The prayer is, that the corporation may be adjudged to pay the award to the plaintiffs, instead of the defendant, Palmer; and if the defendant, Palmer, has received any part of the award, that the plaintiffs may recover against him the sum so received.

The allegations which have been stricken out will not aid the plaintiffs in obtaining such a recovery as is here demanded.

The court cannot, by an action, try the irregularities complained of, nor receive in evidence what was said by the corporation counsel or the court upon the application to confirm the report of the commissioners. Upon an allegation that the corporation had taken the plaintiffs' land without payment, the plaintiffs would recover, if their title was good, and the money had not been paid under the award. The plaintiffs should have caused the corporation to be enjoined, if there was any danger in permitting the money to be paid to Palmer. Or, if the money awarded to Palmer has been paid over, the plaintiffs can maintain their action therefor against him.

Perhaps the action against Palmer can be maintained by the plaintiffs under the act of 1813, entitled, "An act to reduce several laws relating particularly to the city of New York into one act." (*Vide Davies' Laws*, relating to the city, page 539, § 184). But the action, if maintained for these purposes, requires no such allegations as have been expunged.

Under no aspect in which the complaint can be considered

will the allegations in question be material. Even were the action founded on fraud and collusion, the sayings of the corporation counsel or the court, made at the hearing of the motion, in respect to the effect of the order of confirmation, would be wholly irrelevant.

It is not every fact which may be given in evidence at the trial that may be stated in pleading. The legal conclusion, or fact, to be established or proven by the evidence of what was said by the corporation counsel or the court might, perhaps, be material as an averment, but the evidence itself is irrelevant as a pleading. The allegations complained of tend to show, as evidence, that the report of the commissioners and the order of confirmation do not constitute the matter *res judicata.* But if the averment that the proceedings did not constitute the matter *res judicata* as against the plaintiffs were material, the allegations stricken out would be insufficient for that purpose, and must be considered irrelevant. With such an object before the mind of the pleader, these allegations would, at best, be a pleading of evidence merely, and therefore irrelevant.

The brief of the plaintiffs' counsel gives no suggestion of any theory upon which his action is founded. He says the order mutilates his theory, and turns the remaining allegations against himself. While we fail to perceive any theory upon which he intends to maintain his action, we must leave him to amend the remaining allegations to suit his altered complaint, if he shall be so advised.

We think the order appealed from is correct, and affirm it with costs.

Sutherland, P. J., and Barnard, J., concurred.

See 44 Superior 9

GILDERSLEEVE *a.* THE BOARD OF EDUCATION.

New York Common Pleas; General Term, July, 1863.

COMMON SCHOOLS IN NEW YORK CITY.—REMOVAL OF TEACHER.—SCHOOL TRUSTEES.—NOTICE OF MEETINGS.—RESIGNATION OF TRUSTEES.—REMOVAL.—POWER OF MAJORITY.—PUBLIC AND PRIVATE TRUST.—CORPORATION.

A certificate, issued under the Laws of 1851, ch. 386, § 11,—which makes it the duty of the city superintendent, under general regulations of the Board of Education, to examine into the qualifications of persons proposed as teachers of common schools in the city of New York, and to grant certificates,—need only specify in which class of schools the person is qualified to teach.

And where, under this statute, and a by-law of the Board of Education which required that the certificate given should express the grade of the teacher, the superintendent gave a certificate expressing the grade, and that the teacher was qualified as first assistant of a grammar-school;—*Held*, in the absence of evidence of any further regulation of the board, that the teacher might lawfully serve as principal of the primary department of a grammar-school.

The power of the board of trustees to employ teachers under the same statute, coupled with the general authority to conduct and manage the schools, necessarily implies the right to remove them, especially under a by-law of the Board of Education regulating the proceedings on such removal.

The power of the city superintendent, under the same statute, to annul the certificate given to any teacher, is distinct from the power of the trustees to remove a teacher.

The members of a body intrusted with the management of a matter of public concern,—*e. g.*, a board of school trustees,—are deemed to have notice of a general or stated meeting held pursuant to the by-laws of the body.

Under section 10, subd. 7, of the same statute, which authorizes the trustees by the vote of a majority to declare vacant the seat of any trustee who shall refuse to attend three stated meetings, the tender by a trustee of his resignation, with its acceptance by a majority, renders his seat vacant.

The office of a trustee of common schools in the city and county of New York, becomes vacated by the removal of the incumbent from the county.

In case of a vacancy in the board of trustees of common schools in New York city, the remaining members of the board are authorized to continue the performance of the duties of the board without waiting till the vacancy is filled, inasmuch as the power of appointment, or of nominating for appointment, is not vested exclusively in the board of trustees.

When a general power is conferred upon two or more bodies, they must all come together for consultation and deliberation; though when they have done so, the vote of the majority of the persons present controls, even though one of the bodies should leave before the vote is taken.

The provision of 2 Rev. Stat., 555, § 27, that where a duty or authority is confided by law to three or more persons, a majority of such body may act upon a meeting of all, is applicable to the boards of trustees of common schools in the city of New York.

This provision, in its application to bodies intrusted with the management of matters of public concern, is to be thus interpreted: that when all the members are notified that a meeting is to be held, and a majority of the whole number attends, the majority so attending may organize and legally proceed to the transaction of business. As respects those who neglect or refuse to attend, it is the same as if they had attended and dissented from the act of those who were present.

Where, in matters of a private nature, a power is to be exercised by certain designated individuals, all must concur in its exercise, and the death, absence, or disability of any one of them, will not make the execution of the power by the remainder of them valid.

But where powers, to be exercised as a continuous public trust or duty, are confided to designated persons, and some die or become disqualified, the others may discharge the trust or perform the duty, provided there is a sufficient number to confer together, deliberate, and, in view of a possibility of division of opinion, to decide upon the course to be adopted.

If such a power or duty is confided to two only, and one dies or becomes incapable of discharging it, the other cannot act alone, unless, to prevent a failure of justice, it is indispensable.

The Board of Education of the city and county of New York may be sued: possessing the powers and privileges of a corporation, it is subject to the obligations incident to such powers.

Appeal from a judgment dismissing the complaint.

This action was brought by Laura H. Gildersleeve against the Board of Education of the city and county of New York to recover $233.33, her salary, for the term of seven months, as a teacher in one of the public schools of the city of New York, after an alleged discharge from her position. The facts sufficiently appear from the opinion.

Calvin M. Northrup, for the appellant.—I. The meeting of 20th August, 1858, was illegal. 1. Because all of the members of the board of trustees were not present; and those who were not present, were not notified of the meeting. (*Code on Pub. Instruction*, 95, 244; 2 *Rev. Stat.*, 555, § 27; Horton *a.* Garrison, 23 *Barb.*, 176; Lee *a.* Parry, 4 *Den.*, 125; Doughty *a.* Hope, 3 *Ib.*, 594; 1 *N. Y.* (1 *Comst.*), 79; People *on rel.* Mygatt *a.* Supervisors of Chenango, 11 *N. Y.* (1 *Kern.*), 563; Fitch *a.* Commissioners of Kirkland, 22 *Wend.*, 132; Downing *a.* Rugar, 21 *Ib.*, 178; Whitford *a.* Scott, 14 *How. Pr.*, 302;

Powell *a.* Tuttle, 3 *N. Y.* (3 *Comst.*), 396; Olmsted *a.* Elder, 5 *N. Y.* (1 *Seld.*), 144; 16 *Maine*, 185; *Code*, *Pub. Instr.*, 28, 243.) 2. There being a vacancy by the resignation of Bellamy, there was no legal board, and they could do no act except join with the other school officers of the ward in nominating a person to fill the vacancy. (*Code*, *Pub. Instr.*, 243; Pell *a.* Ullmar, 21 *Barb.*, 500; 1 *Barn. & Ald.*, 608; 3 *Madd.*, ch. 361.)

II. The trustees of a school district have no power to dismiss a teacher holding the proper certificate, without cause and against his consent, before the expiration of the contract (Finch *a.* Cleveland, 10 *Barb.*, 290; 2 *Kent's Com.* [8th ed.], 283, *n.*; Murdock *a.* Phillips Academy, 12 *Pick.*, 244), or his license is revoked by the city superintendent. (*Davies' Laws*, 1052, § 11.) No such power is given to the trustees. (*Ib.*, 1050, § 10.)

III. The referee is in error in supposing that 2 Rev. Stat., 555, § 27, does not apply to school trustees. (Whitford *a.* Scott, 14 *How. Pr.*, 302; Lee *a.* Parry, 4 *Den.*, 125.) He is in error, likewise, in holding that the statute, making it the duty of the trustees to meet at stated times, waives the necessity of notice. Canvassers of election are also required to meet statedly; but it is well settled by the cases already cited, that they must all be present, or notified to be present. No notice of the meeting having been given, six members could not constitute a quorum by the very terms of the by-laws, as well as by the statute; there is no general rule which makes a majority a quorum. (Downing *a.* Rugar, 21 *Wend.*, 179.) The report of the referee should be set aside, because it does not find the facts proven.

IV. The school law of this city is but an extension of the State system to the city; hence the decisions of the courts of the State will be directly in point.

Abraham R. Lawrence, Jr., for the respondents.—I. Under the pleadings, it was necessary for the appellant to show that she was legally appointed to the position which she occupied. The rule, that proof that a person acts as and claims to be an officer, is *prima-facie* evidence that he is such officer, does not apply to actions in which that person is himself a party, and claims to recover fees, or sets up a right of property as the incumbent of the office. (People *a.* Hopson, 1 *Den.*, 574; Parker *a.* Baker, 8 *Paige*, 428; Green *a.* Burke, 23 *Wend.*, 490;

People *on rel.* Morton *a.* Tieman, 30 *Barb.*, 193; S. C., 8 *Abbotts' Pr.*, 359; Riddle *a.* County of Bedford, 7 *S. & R.*, 386; Keyser *a.* McKimmin, 2 *Rawle*, 139.) The respondents are mere disbursing officers in reference to the payment of the salaries named in the pay-rolls of each ward; the parties who contract with and employ teachers, are the trustees of common schools in the various wards (*Davies' Laws*, 1050, § 10); the respondents are, therefore, not estopped from denying the validity of the appellant's appointment.

II. It was necessary for the appellant to prove that during the period for which she claimed compensation she had the requisite license, and was qualified to teach as principal of the primary department. The certificate of the appellant does not express the position for which the appellant claims to be qualified, nor that she is qualified to teach in the capacity of principal.

III. If the appellant ever was legally appointed to the office in question, she was legally removed. The meeting of the 20th August, 1858, was a legal meeting of the board of trustees, and the proceedings at such meeting in relation to the removal of the appellant were valid. It is only necessary to give validity to a resolution of a body of *quasi* legislative powers, such as the board of trustees, that it should be passed at a regular meeting of such board, at which a quorum was present (2 *Bouv.*, 418); and the rule is, that where an act is to be done by a definite number of persons, a majority of such number will constitute a quorum (*Angell & Ames*, 568, § 501; *Exp.* Willcocks, 7 *Cow.*, 402); and that where a majority of the body have met, a majority of such majority may decide. (*Exp.* Willcocks, 7 *Cow.*, 402; Rex *a.* Bellringer, 4 *T. R.*, 410; Rex *a.* Miller, 6 *Ib.*, 268; Rex *a.* Munday, *Cowp.*, 538; Blackie *a.* Blizard, 9 *Barn. & Cress.*, 851.) These rules were strictly complied with; the resolution removing the appellant was passed by a majority of the quorum, and also by a majority of the whole board. That no notice was given by the secretary of the holding of the meeting, is unimportant. The trustees, by appointing stated meetings, were, in fact, notified by their own act, in making such appointment; every member of a *quasi* legislative assembly is bound to take notice of the regular meetings of the board. (*Cushing's Legislative Assemblies*, § 267.)

The section of the Revised Statutes, cited by the appellant's counsel, refers to ministerial or executive officers.

IV. The respondents never contracted with, hired, or employed the appellant. (*Davies' Laws*, 1050, § 10; *Ib.*, 1047, § 8.)

V. The name of the appellant having been omitted from the pay-rolls prepared by the school trustees, the respondents are not liable, even if the appellant was illegally removed; her remedy is against the board of school trustees.

VI. In Hill *a.* Supervisors of Livingston, 12 *N. Y.* (2 *Kern.* 52), the remark of Allen, J., on which the appellant's counsel relies, was entirely *obiter*, and was not expressly assented to by the rest of the court; besides, the point was not raised that supervisors could not be sued at all. (*Ib.*, 54.) That the supervisors cannot be sued, has been often decided. (Brady *a.* Supervisors of New York, 10 *N. Y.* (6 *Seld.*), 260; S. C., 2 *Sandf.*, 460; Boyce *a.* Supervisors of Cayuga, 20 *Barb.*, 294.) The reasoning in these cases is equally forcible to show that no action can be maintained by the appellant against the respondents herein. (See also Gardner *a.* Board of Health, 10 *N. Y.* (6 *Seld.*), 409; S. C., 4 *Sandf.*, 153.)

Daly, F. J.—The certificate given by the city superintendent to the plaintiff was in the form prescribed by the Board of Education. It was, that she was qualified to teach as first assistant of a grammar-school, and that she was licensed as a teacher of grade A.

Upon the certificate, she was appointed by the board of school trustees of the twelfth ward principal of the primary department of grammar-school No. 37 in that ward, and discharged the duties thereof for the period of two years and eight months; that is, from the 1st of January, 1856, to the 17th September, 1858; her salary being regularly paid to her without objection up to the 17th September, 1858, when another person was installed as principal in her place. The present action is brought to recover her salary for the seven months which elapsed from the 17th of September, 1858, to the commencement of the action, during which period, though willing, she has not been allowed to render any service, and another person has been acting as principal. It is objected, first, that she was never legally

appointed principal, as the certificate given her by the city superintendent did not state that she was qualified for that position. All that the statute requires is, that the certificate shall specify in which class of schools and in what capacity the person is qualified to teach. (*Davies' Laws*, relating to the city of New York, p. 1052, § 11, subd. 2.) Her certificate fully complies with this requisition. It declares that she is qualified to teach a common or grammar school, and it expresses in what capacity, that is, as the first assistant. The Board of Education have prescribed the form of the certificate, and declared that it shall always express the grade of the teacher, and the position for which he is qualified. (*General Rules and Regulations of the Board of Education*, Art. VIII., § 3.) The certificate complies with this regulation also, as it expresses her grade and the position for which she is qualified. She was appointed by the trustees as principal of the primary department of a grammar-school, and I find nothing in the statute, nor in the portion of the general regulations of the Board of Education which have been given in evidence, to show that the trustees may not appoint as principal of a primary department of a grammar-school a person qualified to teach as first assistant. The only restriction in the regulations of the Board of Education, so far as we are informed of them by the evidence, is the provision declaring that no teacher, except of grade A, shall be employed as principal or vice-principal in a grammar school, or as principal in any primary school. The certificate of the plaintiff shows that she is of that grade; and, for all that we know, a person qualified to teach as first assistant in a grammar-school may be fully competent to act as principal of the primary department of such a school. The statute declares that the board of trustees of each ward shall have the power, under such general rules and regulations as the Board of Education may adopt, to contract with and employ teachers, and to conduct and manage the schools (*Davies' Laws*, p. 1050); and under such a general authority as this, we must conclude that the board of trustees had the right to employ, as principal of the primary department of a grammar-school, a person certified as competent to teach in the capacity of first assistant of such a school, unless there was some regulation of the Board of Education to the contrary; and and if there was, it was incumbent on the defendants to show

it. Our attention is called to subdivision 2 of section 3 of article XVIII. of the regulations of the Board of Education, in which it is declared that no person shall be entitled to receive salary as a teacher of a common school, without a certificate in the form prescribed by the board. The short answer to which is, that the plaintiff had such a certificate, setting forth her grade as a teacher, and the position which she was qualified to fill.

The plaintiff, then, having been legally appointed and in the full discharge of her duties up to the 1st of September, 1858, the next question that arises is, whether she has been legally removed.

I entertain no doubt of the power of the board of trustees to remove her.

The power to employ teachers necessarily implies the right to remove them, especially when, as in this case, it is coupled with a general authority to conduct and manage the schools.

The rules or regulations of the Board of Education are framed with especial reference to the exercise of such an authority, inasmuch as the trustees are required, upon dismissing a teacher, to file with the clerk of the Board of Education a copy of the resolution directing it, and to notify the teacher in writing of the cause of the dismissal; and the teacher is allowed twenty days, after the service of this notice, to appeal to the Board of Education, and if that body decide that there was no good cause for dismissal, the teacher is restored to the former position, and is to be paid as if no dismissal had taken place. (*General Rules and Regulations of the Board of Education*, art. VIII., subd. 14 and 15.)

The provisions of the statute, interpreted as they must be in connection with the general rules and regulations of the Board of Education, show very plainly that the trustees of a ward have the authority to dismiss a teacher.

The provision in the statute by which the city superintendent of schools is empowered to annul the license of a teacher for any cause he may deem satisfactory, is a power separate and distinct from the authority to remove existing in the board of trustees. It is to be exercised only after ten days' notice to the teacher, and to the trustees of the ward, and after the teacher has been allowed a hearing. It is not subject to review on the

part of the Board of Education; but the remedy in the event of its improper exercise is, by statute, by an appeal within twenty days after the service of notice to the State superintendent. Its exercise by the city superintendent renders the removal of the teacher by the trustees of the ward an act of necessity, as the incumbent is no longer qualified to teach; but there is nothing in the statute indicating that the annulling of the license by the superintendent was intended by the Legislature to be the only mode in which a teacher could be removed. On the contrary, it is something more than the mere removal of a teacher. It takes away altogether the license which is the evidence of the qualification to teach, and without which the person cannot be employed thereafter in any school; whereas, the dismissal of a teacher by the trustees of a ward is no barrier to the same person being employed by the trustees of another. The plaintiff, having been engaged for no fixed period, was liable to be removed at any time, and the only question is, whether that power has been legally exercised.

The by-laws of the board require that the secretary shall notify every member of all meetings. The secretary did not notify the members of the meeting at which the resolution was adopted removing the plaintiff; and that being the case, it is insisted that she could not be removed unless all the trustees were present. The answer to this objection is, that all the trustees then entitled to act had notice of this meeting. It was a general, or stated meeting, the day, the place, and the hour for which were fixed by the by-laws; and of such a meeting all the members are deemed to have notice. (The King *a.* Harris, 1 *Barn.* and *Ad.*, 936; the Queen *a.* Grimshaw, 10 *Ad.* and *E. N. S.*, 747.)

The secretary testified that it had not been his custom nor the practice of the board during that year to give notice of the stated meetings, and the omission to do so proceeded doubtless from the fact that it was unnecessary, as every member knew, by the by-laws, when these meetings were held.

The board of trustees is composed of eight trustees and of two commissioners, who are *ex-officio* members of the board, making in all ten persons. When the meeting was convened, at which the plaintiff was removed, there were but nine who were qualified to act, the office of one of the trustees (Bellamy)

being vacant. He had resigned more than a month previously, and a resolution had been adopted at a prior meeting accepting his resignation. A majority of the board of trustees may declare the seat of any trustee vacant who shall refuse to attend three stated meetings. (*Davies' Laws*, 1051, subd. 7.) The tender of his resignation on the part of a trustee is equivalent to such a refusal; and the adoption of a resolution accepting it, by a vote of a majority of the board, is, in effect, declaring the office vacant. In addition to which the trustee had removed to Rochester, and ceasing to be an inhabitant of the county, the office by statute became vacant. (1 *Rev. Stat.*, 122.)

It is insisted that the board could do no act until this vacancy was filled, or until the trustees had nominated a person to the Board of Education to fill it. There would have been some force in this objection if the power of appointing a trustee, or of nominating one for appointment, was vested exclusively in the board of trustees. But this power is vested by law in two other bodies.

When the office of a trustee becomes vacant, the board of school officers are to nominate a person to fill the office, and the power of appointment is in the Board of Education.

The board of school officers is a distinct body. It is composed of three integral parts—the trustees, the commissioners, and the inspectors—and each of these parts must co-operate in the nomination; that is, each part must be represented by a majority at a general meeting of the whole, or they can do no act; for when a general power is conferred upon two or more bodies, they must all come together for consultation and deliberation; though when they do, the vote of the majority of the persons present controls, even though one of the bodies should leave before the vote is taken. (The King *a.* Bower, 1 *Barn. & C.*, 492; *Exp.* Rogers, 7 *Cow.*, 526, 533, *note; Exp.* Humphrey, 10 *Wend.*, 612; People *a.* Whiteside, 23 *Ib.*, 9; 26 *Ib.*, 634.)

If the inspectors should not attend the meeting, the other two parts—the commissioners and the trustees—could make no nomination; and such being the fact, the board of trustees, having, as a body, neither the right to nominate nor the power of appointment, are not responsible if the vacancy is not filled. Nor does it follow that they must suspend and stop the transac-

tion of all business until it is filled. They are not answerable if the other two bodies delay or omit to perform the duty enjoined upon them by law. They are a separate body, having their own peculiar class of duties to discharge, and it might prove highly detrimental to the public interest to hold that they must cease to act until the vacancy is supplied.

But six trustees attended the meeting at which the resolution was adopted removing the plaintiff, five of whom voted for it, and one against it. It is urged that by the Revised Statutes such an act could not be done, except at a meeting at which all the trustees were present. The provision relied upon is in these words: "Whenever any duty or authority is confided by law to three or more persons, and whenever three or more persons are authorized or required by law to perform any act, such act may be done, and such power, authority, or duty, may be exercised and performed by a majority of such persons or officers, upon a meeting of all the persons or officers so intrusted or empowered, unless special provision is otherwise made." (2 *Rev. Stat.*, 555, § 27.) The referee was of opinion that this provision was not applicable. In this, however, he was mistaken. There is nothing in its language limiting its operation, and it has frequently been held to apply in analogous cases. (Whitford *a.* Scott, 14 *How. Pr.*, 302; Lee *a.* Parry, 4 *Den.*, 125.)

The interpretation to be put upon this provision, in its application to bodies intrusted with the management of matters of public concern, is, that where all the members of the body are notified that a meeting is to be held, and a majority of the whole number attend, the majority so attending may organize and legally proceed to the transaction of business. (McCoy *a.* Curtice, 9 *Wend.*, 17; *Exp.* Rogers, 7 *Cow.*, 526.) The dispatch of public business is not to be prevented, and the interest of the public is not to suffer, because one or more members, after being notified, are unable to or neglect to attend. If all have been duly notified, it is, within the meaning of the statute, "a meeting of all the persons;" and if a majority of the whole number attend, it is competent for that majority to do any act or exercise any power confided by law to the body collectively. As respects those who cannot, who neglect to or who refuse to attend, it is the same as if they had attended and

had dissented from the act of those who were present. (Horton *a.* Garrison, 23 *Barb.*, 176.)

There were but nine trustees who were entitled to act, as Bellamy had removed from the county, and by statute could act no longer. The board, consequently, as it then stood, consisted only of nine members, and as five of that number voted for the resolution, that was a majority of the whole. Where in matters of a private nature a power is to be exercised by certain designated individuals, all must concur in its exercise, and the death, absence, or inability of any one of them, will not make the execution of the power by the remainder of them valid. (Townsend *a.* Wilson, 1 *Barn. & A.*, 608; Anon., *Dyer*, 177.) But where powers, to be exercised as a continuous public trust or duty, are confided to designated persons, the discharge of the public duty or trust is not to be interrupted or fail, through the death, absence, or inability of any of the persons to whom the exercise of it is intrusted, provided there is a sufficient number to confer together, deliberate, and in view of the possibility of division of opinion, to decide upon what course is to be adopted; and if the power or duty is confided only to two persons, and one of them dies or is incapable of discharging it, the other cannot act alone (Pell *a.* Ulmar, 21 *Barb.*, 500), because there can be no conferring together in such a case; but where, to prevent a failure of justice, it is indispensable that one should act alone without conferring with the other, he may do so, and the act will be valid. (Rex *a.* Warrington, 1 *Salk.*, 152; Naylor *a.* Sharpless, 2 *Mod.*, 23; Rich *a.* Player, 2 *Show.*, 286; *Vin. Abm. Coroner*, 7; 14 *Vin. ut supra.*) If the public duty is intrusted to three, and one dies or is disqualified, I doubt if the others can act alone, as, in the event of division of opinion, there can be no decision; but if there is more than three remaining, the majority can decide, and if all qualified to act are notified, as was the case here, an act done by the majority of them is in my judgment valid. In this view, as there were only nine trustees entitled to act, a resolution, in favor of which five voted, was a resolution passed by a majority of the whole body as it then existed. Entertaining this view, the plaintiff was legally removed, and she cannot maintain the action. Upon the argument of this appeal, the counsel only discussed the single question whether the Board of

Education could be sued in any case; and, upon the submission, it was the understanding that if we were of opinion that the defendants could be sued, the counsel then desired to argue the other questions set forth in these points, which I have passed upon. But, since the argument, the counsel have stipulated to submit the whole case upon the points which have been laid before us, and thus the necessity of another argument is obviated. Respecting the single question which was discussed, I have to say that I entertain no doubt of the right to maintain an action against the Board of Education for the recovery of a teacher's salary. Though the power of appointing teachers is in the trustees, the payment of the salaries is imposed by law upon the Board of Education, and they are authorized to draw from the moneys which shall be raised for the purpose of public education such sums as may be requisite for the purpose. (*Laws of* 1851, 735, ch. 386, § 2, subd. 5; § 3, subd. 1, 2, 5, 7; § 9.) They may take and hold property, both real and personal, for the purpose of public education in the city of New York; and for all the purposes for which they were created, it is declared that they shall possess the powers and privileges of a corporation. (*Ib.*, § 2, subd. 1; § 8.)

If they possess the privileges and powers of a corporation, they must be subject to the obligation incident to the exercise of such powers. In the cases where it has been held that actions could not be maintained against public bodies *eo nomine*, but must be brought against the members individually, it has been where they possessed no corporate powers, but formed an integral part of the corporation of a county, as in the case of the board of health, or of the supervisors of the city and county. (Brady *a.* Supervisors of New York, 2 *Sandf.*, 460; 10 *N. Y.* (6 *Seld.*), 260; Gardner *a.* Board of Health, 4 *Sandf.*, 153; 10 *N. Y.* (6 *Seld.*), 409.)

Hilton and Brady, JJ., concurred.

Judgment affirmed.

MITCHELL *a.* MOUNT.

New York Common Pleas; At Chambers, July, 1863.

EXECUTORS AND ADMINISTRATORS.—COSTS.

The provisions of 2 Rev. Stat., 90, § 41,—directing that costs shall not be awarded in actions brought against executors or administrators in their representative capacity, except for unreasonable resistance, neglect or refusal to refer the claim,—do not affect actions brought against the deceased in his lifetime, and revived by his executors or administrators.

Motion for an allowance.

This action was brought by John Mitchell and another, assignees, against William B. Moffat, in his lifetime, to recover the amount of a demand for labor and materials in repairing defendant's buildings. The defendant interposed an answer: after his death the suit was revived by his executor, Richard E. Mount, Jr. The cause was tried before a referee, who reported in favor of plaintiffs for $1,020.84. The plaintiffs claimed costs as of course, and now moved for an allowance.

William R. Stafford, for the plaintiffs, cited Lemen *a.* Wood (16 *How. Pr.*, 285).

Gouverneur Tillotson, for the defendant, insisted that the plaintiffs must move specially for costs as in ordinary actions against executors, and that no allowance could be made.

BRADY, J.—The case of Lemen *a.* Wood (16 *How. Pr.*, 285), is decisive of the plaintiffs' right to costs. The testator having interposed a sworn answer, which, if true, was a defence, it was not necessary for the plaintiffs to offer to refer the claim. An issue had already been formed. Whether this be correct or not as a legal proposition, there can be no doubt that all obligation to make such an offer is removed when the executor makes an application to revive the suit. That is a continuation of the testator's will in reference to the claim, and expressive of a de-

sire that it should be litigated in the manner in which he presented his defence. I am aware that in the case of McCann *a.* Bradley (15 *How. Pr.*, 79), it was held that when the defendant dies *pendente lite* the plaintiff cannot recover costs unless he offers to refer; but in that case the motion to revive was made by the plaintiff, and he claimed more than he was entitled to, "nearly twice as much," as said by Justice Roosevelt. It could not be said that the demand was unreasonably resisted in that case, and the decision cannot be regarded as an authority on the single proposition that an offer to refer was necessary. In this case the demand made by the summons was $820.88, and the recovery was for $907.88, allowed upon an amendment of the complaint by which the demand was increased to $937.88. This case differs, therefore, from McCann *a.* Bradley, in two important features. I think, however, that the provisions of the Revised Statutes referred to, relate, as stated in Lemen *a.* Wood, to actions commenced against executors. The object of those provisions was to save unnecessary expense to the estate and to hasten the determination of controversies arising upon disputed claims. The plaintiff here should not be compelled to abandon proceedings commenced during the lifetime of the testator, which would be the effect of requiring him to adopt a formula which the statute contemplates as preliminary to any action against an executor. For these reasons I think the plaintiff entitled to costs, and an allowance of five per cent.

Ordered accordingly.

THE PEOPLE *on rel.* EAGLE *a.* KEYSER.

Court of Appeals; January Term, 1864.

MORTGAGE.—DESCRIPTIO PERSONÆ.—EXECUTORS AND ADMINISTRATORS.—PARTNERS.—SATISFACTION OF MORTGAGE.—DISCHARGE OF RECORD.—SATISFACTION OF JUDGMENT.

Where a mortgage was given to "M. and W., executors of the estate of E.," and payable to "the party of the second part, his executors, administrators, and

assigns,"—*Held*, that the appellation was merely descriptive, and that the mortgage was the individual property of M. and W.

Where two executors or administrators take an obligation to themselves jointly as representatives of their testator, for a debt belonging to his estate, one of them can receive payment and lawfully discharge the obligation.

The same rule applies in the case of an obligation in favor of partners, and a release by one is a discharge of the obligation.

Under the provisions of 1 Rev. Stat., 761, § 28, the register is bound to discharge of record a mortgage in favor of two or more jointly, on receiving a certificate of satisfaction executed and acknowledged by one only of such mortgagees.

It seems, that it is the duty of the county clerk to satisfy of record a judgment in favor of several, on receiving a satisfaction-piece executed by one only of the judgment creditors.

Appeal from an order of the Supreme Court, First District, refusing a mandamus.

The proceeding was instituted by William Eagle against John Keyser. A motion was made on due notice, in the Supreme Court, at special term, for a mandamus, directed to the register of the city and county of New York, commanding him to file a satisfaction-piece of a mortgage recorded in his office, and to cancel and discharge of record the mortgage. The motion was denied by order of the court.

On appeal, the court, at general term, reversed that order, and directed a mandamus to issue, commanding the register to receive and file, and record in his office, the satisfaction-piece. (39 *Barb.*, 587.) But the court would not require the register to discharge the mortgage on the record, and the appellant appealed from the order, so far as it did not direct the writ to issue for that purpose. The mortgage was made by the relator, William Eagle, to Samuel Maycock and John Wright, executors of the will of James Espie, deceased, to secure the payment of $1,200, being money belonging to the testator's estate, loaned by them as such executors to Eagle. Maycock having died, the money was paid to John Wright, the surviving executor, and the certificate of payment was executed and duly acknowledged by him. The mortgage purported to be made by William Eagle, of the first part, to "Samuel Maycock and John Wright, executors of the estate of James Espie, deceased, of the second part," who were described subsequently in the mortgage as "the party of the second part." The register declined to receive or file the certificate, or to cancel or discharge

of record the mortgage, on the ground that it should be executed not only by John Wright, but also by the executors of the will of Samuel Maycock. It was proved by affidavit that they refused to execute it, insisting that they, as executors of Mr. Maycock's will, had no interest in the mortgage, and that the mortgage debt did not belong to his estate, or form any part of its assets. It was shown by affidavit that the loan to Eagle was made by Maycock and Wright as executors of the will of Espie, and that the mortgage was held by them as such executors, and the money secured by it belonged to the estate of Espie.

Marshall S. Bidwell, for the appellant.

Richard H. Bowne, for the respondent.—I. The register is authorized to discharge the mortgage only when a certificate signed "by the mortgagee, his personal representatives or assigns," shall be presented to him. (1 *Rev. Stat.*, 761, § 28.)

II. The certificate offered to the register by the relator was not such as is prescribed by the statute. It affected to treat the mortgage as the property of the estate of James Espie, and the certificate is signed by "John Wright, surviving executor." The uniform practice in the register's office for the last thirty years, in respect to such mortgages, is shown by affidavit. And the case of People *a.* Miner (32 *Barb.*, 612), is an express decision that upon such a certificate the register should not cancel the mortgage. (Same case, 23 *How. Pr.*, 223.)

III. The relator on this application does not come before the court as the survivor of two mortgagees who have made a joint loan; he claims simply to act as surviving executor, and as if the mortgage money was payable to him as such executor. From the face of the mortgage, it is not the property of the estate, but that of the mortgagees themselves. (Peck *a.* Mallams, 10 *N. Y.* (6 *Seld.*), 509.) It seems doubtful whether a mortgage taken to two persons jointly, survives so that the survivor can collect the whole. (Rigden *a.* Vallier, 2 *Ves. Sr.*, 258; 2 *Story's Eq.*, § 1206; 2 *Powell on Mortg.*, 699, 700.) In view of this doubt, and the uniform manner in which the register's predecessors have conducted the business of that office, the register was justified in refusing to discharge this mortgage.

By the Court.—Balcom, J.—According to the decision of this court, in Peck *a.* Mallams (10 *N. Y.* (6 *Seld.*, 509)), the words "*Executors of the Estate of James Espie, deceased*," annexed to the names of the mortgagees, must be held to be merely descriptive of the persons to whom the mortgage was given; and as the money mentioned in the mortgage was payable to Maycock and Wright, "their executors, administrators, or assigns," the register was bound to regard the mortgage as the private property of the mortgagees, their executors, administrators, or assigns. His duty would have been different if the mortgage on its face had shown it was taken by Maycock and Wright as executors of Espie for a debt due his estate. (Bogert *a.* Hertell, 4 *Hill*, 492.)

There can be no doubt that where two executors take an obligation to themselves jointly as representatives of their testator for a debt belonging to his estate, one of them can receive, pay, and lawfully discharge the obligation, whether his co-executor be dead or alive. (*Willard on Ex.*, 209, 269; 4 *Hill*, 492; Stuyvesant *a.* Hall, 2 *Barb. Ch.*, 151; Douglass *a.* Satterlee, 11 *Johns.*, 16; Murray *a.* Blatchford, 1 *Wend.*, 583). One of two administrators can do the same. (See authorities *supra.*) A surviving trustee may do this. (*Hill on Trusts & Trustees*, 3 Am. ed., 442; *Lewin on Trusts & Trustees*, *Law Lib.*, 4th series, vol. 72, p. 284.)

The Supreme Court of Pennsylvania held, in Penn *a.* Butler (4 *Dall.*, 354), where two persons sold real estate which belonged to them as tenants in common, and took bonds and mortgages in their joint names, that the surviving obligee and mortgagee "was entitled to the possession of the joint securities, and that he might recover the amount." The same court held, in Bowes *a.* Seeger (8 *Watts & Serg.*, 222), that where a mortgage was assigned to two persons, payment of it to one of such persons discharged the debt, and that the receipt of the one to whom the payment was made, was evidence to show the debt was discharged.

Kent, Ch. J., in delivering the opinion of the court in Pierson *a.* Hooker (3 *Johns.*, 68), said, "It is a general principle of law that where two have a joint personal interest, the release of one bars the other (Ruddock's Case, 6 *Co.*, 25); and I cannot

perceive that the case of copartners in trade forms an exception to the general rule."

The court held in that case, that the release of a debt due a copartnership by one of several partners by a writing under his hand and seal, in the name of the copartnership, was binding on all the partners.

It was held in Austin *a.* Hall (13 *Johns.*, 286), that in an action by tenants in common for a trespass on land of which they were the coheirs, a release by one of the plaintiffs was a bar to the action.

Fitch *a.* Forman (14 *Johns.*, 172), was an action on a covenant, by which the defendant bound himself to do a certain act by a certain day. One of the plaintiffs, afterwards, by a writing under seal indorsed upon the original agreement, released the defendant from a performance within the time mentioned in the agreement, and extended the time of performance. And the court held such release was a bar to the action, the breach of the covenant assigned being the non-performance of the act by the day mentioned in the agreement. THOMPSON, Ch. J., in delivering the opinion of the court, said, "They (the plaintiffs), had a joint personal interest, and the release or modification by one would bind the other."

Judge Cowen laid down the rule in his treatise (2 *Cow. Tr.*, 2 ed., 772), that a release by one of several persons having a joint demand, is valid against all, even though such demand be the proper subject of trespass, or case, as for a wrong." He cited the cases in Johnson (*supra*).

The principle on which the cases were determined authorized either Maycock or Wright to receive the money for which the mortgage was given, and satisfy the same, though it was their private property, and held by them as tenants in common; and upon the same principle, Wright, as surviving mortgagee, after the death of Maycock could lawfully receive the money mentioned in the mortgage, and execute a certificate satisfying the mortgage, which would authorize the register to discharge the same upon the record.

The right to the money secured by the mortgage being personal (a mere chose or thing in action), either mortgagee could receive the same and discharge the right to recover it of the mortgagor.

Bayley, J., said, in Barton *a.* Williams (5 *Barn. & Ald.*, 395), "There may be cases in which the indivisible nature of the subject-matter of the tenancy in common may raise an implied authority in one to sell the whole." A mortgage is indivisible, and though payable to two persons jointly, the right to receive or recover the money due upon it is single. This right is not divided by the death of one of the mortgagees. Hence the death of Maycock did not affect the right of the surviving mortgagee to keep the mortgage in question and receive the money due on it, and satisfy it.

It is laid down in Graham's Practice, that "on the death of the party with whom the contract was made, if the covenant or promise be to the deceased and another jointly, the action must be brought by the survivor, or his representatives, without joining the representatives of the deceased." (*Graham's Pr.*, 2 ed., 90; see, also, Voorhies *a.* Childs, 17 *N. Y.*, 354; *Cow. Tr.*, 2 ed., vol. 1, p. 553; Anderson *a.* Martindale, 1 *East.*, 497; 4 *Dall.*, 359). The Supreme Court of Maine held, in Williams *a.* Hilton (35 *Maine*, 547), that "a writ upon a mortgage to obtain a foreclosure may be brought and maintained by the surviving mortgagee." But it has been held in Massachusetts, if a mortgage be given to two persons to secure their several demands, and such demands and their different amounts are specified in the mortgage, each has a right to enforce his claim under the mortgage in form adapted to his case, and that the surviving mortgagee cannot maintain an action on the mortgage to enforce payment of the debt due to the deceased mortgagee. (Burnett *a.* Pratt, 22 *Pick.*, 556.) That case was correctly decided, because the mortgage itself divided the money between the mortgagees, so the mortgagor knew from the mortgage how much money belonged to each mortgagee.

But if it should be conceded that our Code now requires the representatives of the deceased mortgagee to join with the survivor in an action for the foreclosure of a mortgage taken by the deceased and the survivor, in their joint names as tenants in common, such requirement would not take away the common-law right of the survivor to receive the money due upon the mortgage when tendered to him, and satisfy the mortgage by a proper instrument in writing, and thus compel the representatives of the deceased mortgagee to look to him for the

money, if it or any portion of it belonged to such mortgagee. If the Code required the representatives of a deceased partner to join with the survivor in bringing actions to recover debts due the copartnership, the survivor would still retain his common-law rights to receive payment of such debts, and completely discharge them by receipts or certificates.

It seems to me, there can be no doubt that the payment of the mortgage to the surviving mortgagee discharged the mortgage, so no action could be maintained on it by the representatives of the deceased mortgagee, or by them and the survivor, or by either.

The only remaining question is, whether the statute respecting the cancellation of the records of mortgages requires that the satisfaction certificate shall be signed and acknowledged by the representatives of the deceased mortgagee as well as the survivor, to authorize the register to cancel the mortgage upon the record.

The statute is, that "any mortgage that has been registered or recorded, or that may hereafter be recorded, shall be discharged upon the record thereof, by the officer in whose custody it shall be whenever there shall be presented to him a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged," &c. (1 *Rev. Stat.*, 761, § 28.) This statute does not mean that all the mortgagees or their personal representatives, must execute and acknowledge the satisfaction certificate to authorize the officer in whose custody the record of the mortgage shall be to record it, and discharge the mortgage upon the record, provided a satisfaction certificate, signed and acknowledged by one of the mortgagees, discharges the mortgagor from all claim of each and every of the mortgagees and their representatives upon the mortgage. (See People *a.* Miner, 37 *Barb.*, 466; S. C., 23 *How. Pr.*, 223; Stuyvesant *a.* Hall, 2 *Barb. Ch.*, 151.) The statute respecting cancelling dockets of judgments is, that the clerk may cancel and discharge them, "upon filing with him an acknowledgment of satisfaction, signed by the party in whose favor such judgment was obtained, or by his executors or administrators, duly authenticated," &c. (2 *Rev. Stat.*, 362, § 22.) But whoever heard it was necessary that all the parties in whose favor a joint judgment is recovered, must sign and acknowledge a sat-

isfaction certificate to authorize the clerk to cancel and discharge the docket? The signing and acknowledging of the proper satisfaction certificate by one of the parties who obtained such a judgment, has always been considered sufficient to justify the clerk in cancelling and discharging the docket of it. And it is not at all probable that everybody has been mistaken respecting the legality of this mode of satisfying judgments. I am not prepared to admit there has been an error touching it; for I think there has not been any.

For these reasons, I am of the opinion the register should have received and recorded the satisfaction certificate, showing the mortgage had been paid, and duly discharged the mortgage upon the record thereof.

It follows, that the portion of the order of the general term of the Supreme Court appealed from, should be reversed, and a mandamus ordered to be issued, as moved for by the relator.

I think no costs should be awarded to either party.

EDSALL *a.* BROOKS.

New York Superior Court; General Term, March, 1864.

LIBEL.—REPORT OF JUDICIAL PROCEEDINGS.—PRIVILEGED COMMUNICATION.

Both at the common law and under the statute (*Laws of* 1854, 314, ch. 130), a fair report of a public official proceeding is a privileged communication, and is libellous only if there be proof of actual malice.

To charge a public officer with "black-mailing," and to assert that he has been dismissed for that cause, is calculated to degrade and bring him into disrepute, resulting in injury to his character with the public, aud is libellous.

The defendants published in their newspaper an account of the proceedings before the commissioners of police against the plaintiff, who was a policeman, upon charges that he had improperly received money for services rendered in the performance of his duty, in which proceedings the plaintiff was dismissed by the commissioners, not so much for having received the reward, but for omitting to give notice of it to the commissioners. The defendants prefixed to their report of the proceeding the following title and statement: "BLACK-MAILING BY A POLICEMAN.—Isaac W. Edsall, of the twenty-sixth precinct, City

Hall police, has been dismissed from the police department by the commissioners, on charges of black-mail preferred against him by citizens in three distinct cases."

Held, that these comments were not privileged, but were unfair and untrue deductions from the facts; and for their publication the defendants were liable.

This action was to recover damages for a libel upon the plaintiff, published in the New York *Evening Express*, of which the defendants are the editors and proprietors.

The alleged libel is in the following words:

"*Black-mailing by a Policeman.*—Isaac W. Edsall, of the twenty-sixth precinct, City Hall police, has been dismissed from the police department by the commissioners, on charges of black-mail preferred against him by citizens in three distinct cases."

The answer of the defendants, after admitting the publication of the alleged libel, sets out the entire article, of which the alleged libel forms a part only. The article alleges that "the first charge is by Cornelius W. Gibson, of Brighton, C. W., who alleges that on the 10th day of April he was in this city, intending to go to British Columbia by the California steamer, and he was induced to go into a Peter Funk auction store, in Cortlandt-street, and there purchased a watch that was warranted gold for $120. The watch turned out to be worthless; and, after some very sharp practices by the Funks, the watch being resold, the victim bought an equally worthless one for $75, but succeeded in getting $25 back, for which he had to pay a commission of $6, thus losing $56. The following Monday, the 4th, he applied to the police, and Edsall was sent to work up the case. He brought up the parties before the Mayor, and they were discharged on refunding the money. Gibson then gave Edsall $5 for his trouble.

"Amos C. Yeomans, also a Canadian, made an affidavit that he was caught in the trap by the Peter Funks, and cheated out of $59 by the same process as his friend Gibson, and at the same place; that on applying to the police, Edsall was detailed to attend to the case, and succeeded in recovering the money for him, and he, Yeomans, made him a present of $4.

"In answer to these charges the officer stated on his trial that after he had recovered the money for the parties they pressed him to take the money as a present, when he said that police

men were not allowed to take any gratuity without permission from the board of commissioners; they still pressed him, and he took the money conditionally, intending to deposit it with the commissioners preparatory to receiving their permission. He was very busy all that day, and could not call on the commissioners. He also stated that on the same afternoon Sergeant Cleary and officer Doyle, of the same precinct, called on Gibson and Yeomans and induced them to make the above statement before the chief clerk.

"Commissioner Acton stated that on the 18th, two days after the complaint was made, and after Edsall had had notice of trial, the $9 was deposited by him with the commissioners.

"There was another affidavit sworn to by John W. Allen, who had been cheated on the 27th of March last by the Peter Funks out of $50. Edsall recovered the money for him, and he paid him $5 for his trouble. On being shown this affidavit, Edsall became quite indignant, and said: 'I deny that in toto. I never had any thing to do with Mr. Allen's case, to my recollection, and I deny taking any money from Mr. Allen. These were the only cases where I have had money tendered me (referring to the cases of Yeomans and Gibson). I admit I received the money in these cases to appropriate it in accordance with the rules of the department.'

"On the book of Captain Silvey, of the twenty-sixth precinct, appears the following entry under date of March 27th:

"'Officer Edsall recovered $48 from No. 1 Park-row, for John W. Allen, of Portland, Me.; settled by the Mayor.'"

This seemed conclusive to the commissioners, and Edsall was immediately discharged from the department.

"Officer John Cronk, of the Broadway squad, has been selected by Mayor Opdyke in the place of Edsall, and has been transferred to the Mayor's office."

The answer further alleges that charges were preferred against the plaintiff before the said commissioners, a trial had, and the plaintiff was, by the judgment or decision of the said police commissioners, dismissed from the said department; and that the publication was and is, in all respects, a just, fair, and impartial account or statement of the charges, trial, and dismissal of the plaintiff from the police department, by a legally constituted public judicial tribunal; and that the printing and pub-

lishing of which is in all respects privileged, and was published with good motives and for justifiable ends.

Upon the trial the defendants gave in evidence a copy of the record of the proceedings before the police commissioners, upon the trial of the plaintiff upon the charges preferred against him. The charges were the same as those stated in the *Express* article, and the plaintiff was removed from office. The plaintiff was charged with violation of the rules and regulations of the police department.

At the close of the evidence, the justice dismissed the complaint.

From the judgment the plaintiff appealed.

A. Sandford, for the appellant.

C. Lawton, for the respondent.

By the Court.*—Monell, J.—Independently of the statute of 1854 (*Laws of* 1854, 314, ch. 130), the publication of a judicial trial, fairly reported and without express malice, is not actionable. The statute is not, therefore, in aid of the common law, but a mere legislative enactment of it. While the statute protects the editor of a newspaper from an action, for a fair and true report of any judicial, legislative, or other public official proceeding, except upon proof of actual malice, it expressly withholds its protection for any libellous comments or remarks superadded to or interspersed or connected with such report. Both at the common law and under the statute a privileged communication or report of a public official proceeding is libellous, if there be proof of actual malice; otherwise no action will lie. The only distinction, therefore, between a privileged report and one that is not privileged, is in the honest purpose or evil design with which it is made and published; and the law will presume malice in all cases where the publication is not privileged.

The libel complained of in this action is contained in the prefatory remark or syllabus which is prefixed to the report of the proceedings before the commissioners of police. It is "blackmailing by a policeman," and states that the plaintiff has been

* Present, Moncrief and Monell, JJ.

dismissed from the police department by the commissioners on charges of "black-mail preferred against him by citizens in three distinct cases." If, then, these superadded remarks are in themselves libellous, and not a just, fair, and true deduction from the proceedings had before the commissioners (which the defendants undertook to report and publish), the defendants are deprived of the benefits of the statute, and are liable in this action.

The charges preferred against the plaintiff, and for which he was subjected to a trial, resulting in his removal from office, were, that he had improperly received money for his services, rendered in the performance of his duty. The proof to establish these charges was, that after being detailed to investigate complaints of frauds committed by mock-auctioneers, and having succeeded in recovering the amounts of which the parties had been defrauded, he accepted, as a voluntary gift, from the persons whose money he had recovered, in one case $4, and in two other cases $5 each. The plaintiff stated on his trial that he received the money conditionally, intending to deposit it with the commissioners, preparatory to receiving their permission.

Although the members of the metropolitan police are inhibited from sharing, for their own benefit, in any present, fee, or gift, for police service, yet the board of police are authorized by statute (*Laws*, 1860, 456, ch. 259, § 65), for meritorious and extraordinary services rendered by a member of the police force in the due discharge of his duty, to permit such member to retain, for his own benefit, any reward or present tendered him therefor; and it is made cause of removal for a member to receive a reward without giving notice thereof to the board.

The offence, therefore, is not in receiving the reward, but in omitting to give notice to the board; and the cause of the plaintiff's removal from office was in neglecting to notify the board that the gratuity had been received by him.

The guilt or innocence of the plaintiff of the charges preferred is not involved in the question now before us. It is sufficient that he was, by a competent authority, adjudged to be guilty; and the publication of the "proceedings" before the commissioners is protected.

I have no difficulty in determining that the comments of the

defendants upon the charges against the plaintiff, disconnected from the report of the trial, were libellous. Any publication which is calculated to injure the character of a person, or to degrade him in the public estimation, is libellous. (Weed *a.* Foster, 11 *Barb.*, 203.) To charge a public officer with "black-mailing," and to assert that he has been dismissed for that cause, was calculated to degrade and bring him into disrepute, resulting in injury to his character with the public. "Black-mail" (from *maille*, French, signifying a small coin), is defined to be a certain rent of money, coin, or other thing paid to persons upon or near the borders, being men of influence, and allied with certain robbers and brigands, to be protected from their devastation. (*Wharton's Law Lex.*, 101.) Substantially, we now attach the same meaning to the term. In common parlance, and in general acceptation, it is equivalent to, and synonymous with, extortion—the exaction of money, either for the performance of a duty, the prevention of an injury, or the exercise of an influence. It supposes the service to be unlawful, and the payment involuntary. Not unfrequently it is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose, the weaknesses, the follies, or the crimes of the victim. There is moral compulsion, which neither necessity, nor fear, nor credulity can resist.

It cannot be doubted, I think, that the term "black-mailing" is invariably regarded as an unlawful act; and though, from its indefiniteness and comprehensiveness, the offence is not classified as a distinct crime, nevertheless, it is believed to be criminal, and to charge a man with "black-mailing," is equivalent to charging him with a crime.

The complaint against the plaintiff was not of a crime. He had not violated any law, he had not extorted money by threat or promise. He had received a voluntary gift, and the penalty of his neglect to notify the board was visited upon him by his removal from office.

Under the facts of this case, I cannot persuade myself that the defendants made either a fair or a truthful deduction from the charges against the plaintiff, nor of the course which led to his removal from office. I do not impute to the defendants any evil design or malignant intent to defame the plaintiff. They may, and most probably did, intend to do no more than to fairly

characterize the offence charged; but they were unfortunate in the use of words conveying a different meaning; and however proper it may be to urge these considerations in mitigation of damages, the defendants must be held responsible for the injury which the law presumes the plaintiff has sustained.

In Thomas *a.* Croswell (7 *Johns.*, 264), the alleged libel was contained in a newspaper account of a legislative appointment. The court (SPENCER, J.) say, "There is no *dictum* to be met with in the books, that a man, under the pretence of publishing the proceedings of a court of justice, may discolor and garble the proceedings by his own comments and constructions, so as to effect the purpose of aspersing the character of those concerned."

In Stanley *a.* Webb, in this court (4 *Sandf.*, 21), the article complained of was headed "Extorting money to hush up the complaint," and then followed a history of the proceedings before the magistrate. The court held the heading not to be privileged. So in Clement *a.* Lewis (3 *Brod. & Bing.*, 297), the heading to an article, "Shameful conduct of an attorney," was held not to be privileged. It was superadded to an account of proceedings in the insolvent debtors' court.

Our conclusions are, that the comments of the defendants, superadded to their history of the trial before the police commissioners, are not privileged—are unfair and untrue deductions from the facts disclosed on the trial, and for the publication of which the defendants are liable in this action.

We are therefore of opinion that the judgment should be reversed, and a new trial granted.

Ordered accordingly.

HALSTEAD *a.* BLACK.

Supreme Court; Special Term, 1864.

PLEADING.—JURISDICTION OF FOREIGN COURT.

In pleading the judgment of a court of record of a sister State, the provision of section 161 of the Code of Procedure applies; and it is sufficient to allege that the judgment was duly recovered, without stating the facts conferring jurisdiction.

Demurrer to complaint.

The contents of the pleadings are sufficiently stated in the opinion.

James, J.—This action was upon a judgment alleged to have been rendered by the Common Pleas of Northampton county, Pennsylvania, a court of record, in favor of the plaintiffs against the defendant.

The complaint, instead of averring jurisdiction in the Pennsylvania court, follows the language of section 161 of the Code, and avers that the judgment was *duly* recovered, &c.

To this complaint a demurrer was interposed, that it does not state facts sufficient to constitute a cause of action.

The demurrer presents the single question, whether in pleading the judgment of a court of record of a sister State, the provision of section 161 of the Code applies. A decision upon this precise point is nowhere reported to my knowledge. Justice Allen, in Hollister *a.* Hollister (10 *How. Pr.*, 532), said: "It appears to be conceded that section 161 of the Code does not apply to foreign judgments;" and from that inferred, that "a general averment of jurisdiction would not be sufficient" (citing 3 *Barb.*, 603); but that case hardly sustains the learned judge in his assertion. Ayres *a.* Covill (18 *Barb.*, 260), also is sometimes cited as an authority to the point here under consideration, but has no bearing thereon.

I can see no good reason why the same rules should not prevail in pleading the judgments of a court of record of a sister State, as in pleading the judgments of such courts of our own State. Judgments of the courts of the several States have the like effect in all the States which they have in the States where rendered, and, when pleaded in an action, the same rules should govern as in pleading our own judgments; and if the allegations of the complaint be controverted, the plaintiff will then be required to establish, on the trial, the facts showing jurisdiction, in the court rendering the judgment, over the subject-matter, and over the person of the defendant.

There should be judgment for the plaintiffs on the demurrer, with costs, with leave to defendant to answer in twenty days, on payment of costs.

KELLY *a.* BLOOM.

New York Superior Court; General Term, March, 1864.

WHO MAY APPEAL.*—JUDGMENT IN APPELLANT'S FAVOR.

A party cannot claim the benefit of a judgment, and at the same time appeal from it.

In an action in which the plaintiff recovered judgment for the purchase-money of certain real property which was subject to the lien of unpaid taxes, &c., the judgment directed the plaintiff to apply the money recovered to the payment of such taxes, &c.; and further declared that if the defendant should first pay them, he should be credited therewith as so much paid on the purchase-money.

Held, that this provision was not a benefit secured to the defendant by the judgment, in such sense that he, having paid the taxes, would be precluded from appealing from the judgment.

It might be otherwise, if the judgment had not directed the plaintiff to pay the taxes out of the purchase-money recovered by him.

Motion to dismiss an appeal.

The action was brought by Richard Kelly, suing as a receiver, &c., against Rachel Bloom, administratrix, &c.

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* In MORTIMER *a.* NASH (*Supreme Court, First District; General Term, Feb.*, 1864), it was *Held*, that a purchaser, at foreclosure sale, was entitled to appeal from an order setting aside the sale, but that the court would not interfere except in a very strong case.

This was an appeal by Charles W. Alcott, John Emmons, and John O. Higgins, purchasers at a sale under a foreclosure, in favor of John Mortimer, Jr., against Daniel D. Nash and others. The court, at special term (LEONARD, J.), set aside the sale as to certain lots. The purchasers appealed.

Eusebius W. Dodge, for the respondent, moved to dismiss the appeal on the ground that the order was not appealable, being in the discretion of the court below,—citing Kingsland *a.* Bartlett (8 *Abbotts' Pr.*, 42).

Wm. Henry Arnoux, for the appellant, opposed.

The Court (SUTHERLAND, LEONARD, and CLERKE, JJ.) held that such an order affected a substantial right, and was appealable.

On the merits being argued, the court held that it would not interfere, unless a very strong case was made out, which it did not seem to the court had been done in this case. The order was, therefore, affirmed, with a modification assented to by the respondent. No written opinion was delivered.

The facts of the case sufficiently appear in the opinion of the court.

S. B. Brownell, for motion.

W. McDermott, opposed.

By the Court.*—Monell, J.—The action, in effect, was to recover the balance of purchase-money of two houses and lots, sold and conveyed by Joseph Lynch to the defendant's intestate, Edward N. Bloom. The cause was tried by a justice of this court without a jury, who found the balance of the purchase-money unpaid to be $1,823.30; and he adjudged that the conveyance from Lynch vested in the defendant's intestate the title to said houses and lots in fee-simple, subject to the lien of certain mortgages thereon, and to the *taxes* and *assessments* which had previously been levied thereon. After allowing certain credits to Bloom, the justice directed the residue of the balance of purchase-money to be paid to the plaintiff, as receiver, to be applied by him, *First*, To the payment of his costs, &c.; and "*Second*, To the payment of all *unpaid taxes and assessments* which were liens upon the said houses and lots; and it is expressly provided, that if said Bloom has or shall have fully paid and satisfied said liens for taxes and assessments, and shall produce to the receiver the receipts therefor, that then he is to be credited therewith, as a payment by him on account of said purchase-money, and shall not be required to pay the amount of said taxes and assessments over to the receiver."

Judgment, upon the decision of the justice, was, on the sixth of April, 1863, entered, *nunc pro tunc*, as of the 13th of February, 1862.

On the 18th of July, 1862, after the decision, but *before the actual entry of judgment*, the defendant paid the taxes upon the houses and lots for the years 1859 and 1860, amounting to $329.65, and on the 16th day of October, 1863, appealed from the judgment to the general term of this court.

If the judgment is to be regarded as entered on the 13th of February, 1862, then the appeal was clearly too late: but neither party so regards it; and it is to be deemed a judgment

* Present, Barbour, Monell, and Garvin, JJ.

entered on the 6th of April, 1863, relating back, in its effects, to the day the decision was made.

It is true, as claimed by the plaintiff's counsel, that a party cannot enjoy the fruits of a judgment which is partly in his favor, and appeal from other parts of the same judgment. The reason is, that the court cannot reverse part of a judgment without reversing the whole; and an election to receive the benefits of the judgment, is a renunciation of the right to appeal.

If the provision in the judgment, authorizing Bloom to pay the taxes, and to have the amount deducted from his payment to the receiver, was a *benefit secured to him by the judgment*, then, perhaps, the payment would have precluded him from appealing. But in the adjustment of the amount due from Bloom, the taxes were to be credited as a lien upon the lots, and allowed to him out of the purchase-money. The receiver was expressly directed to pay the taxes out of the purchase-money, and whether Bloom paid the whole balance of purchase-money to the receiver, and the latter paid the taxes, or Bloom paid them, and deducted the amount from his payment to the receiver, is quite immaterial. It was, therefore, in effect, a payment by the receiver as directed by the judgment.

Suppose the judgment should be reversed, what benefit could Bloom have derived from the payment by him of the taxes? If ultimately his defence should prevail, and it should be declared that the title to the lots was not vested in him, his payment of taxes would be a positive loss.

The actual benefit which he receives from the judgment, is in having the taxes declared to be a lien upon the lots, and having them allowed to him in the adjustment of the amount claimed to be unpaid of the purchase-money. The payment of them, in any view I can take of the question, was not a benefit, but may be a positive loss.

If the receiver had not been directed to pay out of the purchase-money, then the provision in the judgment, standing by itself, would doubtless have been beneficial to the defendant, and she could not enjoy its fruits, and at the same time appeal. But it is immaterial who paid. The lien was to be discharged at all events, and that too with the defendant's money. If the defendant did not pay, the receiver must, and the former re-

ceived no greater advantage by himself paying, than he would had he left it to the receiver.

There is another answer to the motion. Bloom, as the owner of the lots, had a right, irrespective of the judgment, to pay the taxes which were a lien upon his property. Indeed, he was bound to pay them, and if assessed in his name, he was personally liable; and we cannot say that he did not pay them solely to relieve himself from this personal liability. He did, in fact, pay them before the judgment was entered; and it can scarcely be said that, in paying, he availed himself of a beneficial provision in a judgment, which had not then been entered.

The motion should be denied, with ten dollars costs.

Ordered accordingly.

LAKE *a.* ARTISANS' BANK.

Supreme Court, First District; General Term, March, 1864.

BILLS AND NOTES.—FAILURE TO CHARGE INDORSER.—TRIAL.—EXCEPTIONS HEARD AT GENERAL TERM IN THE FIRST INSTANCE.

A bank having discounted a note for a dealer, is not liable for failing to charge a prior indorser, on the dishonor of the note.

It is regular to direct that an exception to an order dismissing the complaint, granted on the trial at the close of plaintiff's evidence, be heard at the general term in the first instance.

Exception to dismissal of complaint heard at the general term in the first instance.

This action was brought by Jarvis N. Lake against The Artisans' Bank, to recover the sum of $1,058.33, being a portion of the balance of about $1,800, standing to the credit of the plaintiff, on the 27th day of July, 1857, on the books of the defendant. That portion of the balance was the proceeds of a note, which the defendant discounted for the plaintiff on the 6th day of May previous, and passed the amount to the plaintiff's credit.

It was alleged in the complaint that the defendant wholly

neglected to charge any of the indorsers, and on the 27th of July, before mentioned, debited the amount of the note to the plaintiff on its books, and then, for the first time, seventeen days after the legal protest day, informed the plaintiff that the note had been protested in Boston.

It appeared at the trial that defendant was duly incorporated.

That on the 10th of July, 1857, when the note matured, and before and after, plaintiff was a customer of the bank.

That on the 6th of May, 1857, the defendant discounted the note, and passed the amount of the proceeds to the plaintiff's credit in the bank.

That the maker and prior indorser then, and at the maturity of the note, resided in Boston.

That the bank was informed of the residence and responsibility of the maker and indorsers when it discounted the note.

That the note matured on the 10th of July, 1857.

That the bank sent the note to Boston for presentment, demand, and notice, &c. That the notary on that day demanded payment of the note at the bank, and payment was refused.

That the indorsers were not served, by the notary, with notice of presentment, demand, and non-payment. Stetson, the maker, and Bates, the first indorser, resided in Boston.

That the note, with the notices of protest, &c., was returned to the cashier, Leake, at New York, by mail on the same day on which payment was demanded, and that the bank omitted to give the plaintiff, as indorser, any notice of its non-paymennt until July 27.

That at the time when the note matured the plaintiff was in Illinois, but returned on the 23d of July, and was in the bank, on business, on that and the next day.

That the plaintiff's office was in the same building with the bank, and his residence in Brooklyn.

That the plaintiff, when informed by the cashier, on the 27th of July, that the bank had charged the amount of the note over to the plaintiff, and when he subsequently drew his check at the request of the cashier, had no knowledge whatever that the note had not been protested. On the contrary, the cashier, in that conversation, informed him that the Boston note had been returned protested.

The bank charged to the plaintiff the expenses of protest.

The plaintiff was nonsuited, but it was directed that his exception be heard at the general term in the first instance.

Capron & Lake, for the plaintiff.—I. The note was not legally protested, and the plaintiff was not, nor were any of the indorsers, legally notified of protest at any time.

II. The bank, being the owner of the note, its omission to regularly protest it, or in any manner notify the plaintiff of protest for seventeen days after the note matured, discharged him from all liability as indorser; and having, for that reason, no legal claim against him thereon, the bank had no right to apply his money then standing to his credit on its books to pay that note. (Commercial Bank of Albany *a.* Hughes, 17 *Wend.*, 94; *Story on Bills*, § 294; *Bayley on Bills*, ch. 7, § 2; Beale *a.* Parish, 24 *Barb.*, 243.) The following are some of the authorities which discuss the subject of diligence in such cases, and the delay of the bank in the case at bar will be found not to be justified by any of them, but the contrary. (Howard *a.* Ives, 1 *Hill*, 263; Bruce *a.* Lytle, 13 *Barb.*, 163; Beale *a.* Parish, 24 *Ib.*, 243; Safford *a.* Wyckoff, 1 *Hill*, 11.)

III. The mere insolvency of the maker is not a sufficient excuse to the holder for his omission to charge the indorser; on the contrary, that fact imposes the obligation of greater diligence on the holder to give notice to the indorser, so that the latter may adopt prompt means to obtain security against his own liability. (Mechanics' Bank *a.* Griswold, 7 *Wend.*, 165, 169; Bruce *a.* Lytle, 13 *Barb.*, 163; *Chitty on Bills*, 449; *Story on Bills*, §§ 326–346; Otsego County Bank *a.* Warren, 18 *Barb.*, 290.) When notice of protest is not given, damage is presumed, until all possibility of injury from the laches is removed by proof on the part of the holder; and no such proof was offered in this case. (Commercial Bank of Albany *a.* Hughes, 17 *Wend.*, 94.)

IV. The transaction which occurred between the plaintiff and the cashier of the bank, on the 27th of July, cannot prejudice the former in this action; the note had been charged to him by the bank, without his knowledge or consent: what he did subsequently, was done under the belief, on his part, that all the indorsers had been charged; and indeed he was expressly authorized to so believe, at that interview, by the cashier.

V. Conceding, for the purposes of this argument, that ordinarily the purchaser or holder of a note is not legally bound to notify prior indorsers for the benefit of subsequent parties,—it does not follow that a bank, which discounts a note for a customer in the usual course of its business, is absolved from responsibility for the same omission.

The bank is not only a purchaser, but from the very nature of the relations created between itself and the customer who has indorsed the note, it is necessarily the agent of the latter for the purpose of charging prior indorsers. A note, discounted by a bank for a customer by passing the proceeds to his credit, with his indorsement, is as really, by the understanding of both parties and the practice of the bank, deposited with the bank for collection, as if it had not been indorsed by the depositor. The bank holds the relation of agency or trust to the depositor in both cases, and receives from him more benefit from the discount than from a deposit for mere collection. (Smedes *a.* Bank of Utica, 20 *Johns.*, 372; Allen *a.* Merchants' Bank, 22 *Wend.*, 215.)

Augustus Prentice, for the defendant.—I. The defendant was owner of the note in question at the time of its maturity.

II. The plaintiff indorsed the note at the time of the discount and transfer of the same to the defendant. The only way the plaintiff was interested in the note after the bank had discounted the same, was as indorser. His rights were those of an indorser, and those only.

III. It is not alleged in the complaint, nor was it claimed on the trial, that this indorsement of the plaintiff was in any manner a qualified indorsement.

IV. The above facts being established by the pleadings, was the plaintiff duly charged as indorser of said note? In the complaint it is expressly alleged, "that when the said promissory note fell due, according to its tenor and effect, the same was duly presented for payment at the Suffolk Bank in Boston, and payment demanded, but the same was not paid." The due presentment and demand of payment being established, but one point more remains, to fix the plaintiff's liability as indorser; and that is, to give him notice of those facts. It is submitted, that he had a sufficient notice. It was given at the earliest

moment, the plaintiff being out of the State when the note fell due.

V. It is immaterial whether the plaintiff was notified as indorser or not. He took the note from the defendant, and also the notices of protest, and gave the defendant a check for the amount of the note and the protest. This was a waiver of notice, whether one had been received or not. This check was charged to the plaintiff's account. What was it given for, but as an order to the defendant to charge that amount to the plaintiff's account?

The plaintiff himself states that the cashier said he wanted the check as authority to charge the plaintiff's account, so as to keep the books straight. (Tebbetts *a.* Dowd, 23 *Wend.*, 379; *Edward on Bills*, 651, 652.)

VI. The only remaining point in this case is, whether the Artisans' Bank, being the owner and holder of this note, was bound to notify Bates; or in default thereof, that this plaintiff, being a subsequent indorser, would be released. It is submitted that the Artisans' Bank, being the owner and holder of the promissory note, were at liberty to charge any one or all the indorsers, as it should elect: that the second indorser is not released because the holder did not notify the first indorser so as to charge him. (Spencer *a.* Ballou, 18 *N. Y.*, 327; Baker *a.* Morris, 25 *Barb.*, 138; *Edward on Bills*, 473, 474; *Chitty on Bills*, 528–530.)

Leonard, J.—This action cannot be maintained. The case of Spencer *a.* Ballou (18 *N. Y.*, 327, 333), is conclusive against the plaintiff on the question of protest.

The defendant was under no obligation to notify Bates, the second indorser, because the bank was then the owner of the note.

The plaintiff knew that he had not been charged as the third indorser, except by the notice handed to him on the 27th of July, and he then voluntarily gave his check for the amount. That was a voluntary payment, and was a waiver of any objection that he had not personally been charged as an indorser by notice of demand from the maker, and non-payment.

His want of knowledge that Bates, his prior indorser, had not been notified so as to charge him as an indorser, was of no consequence. If the plaintiff had known that fact fully, it

would have constituted no defence in an action by the bank against him as an indorser, within the principle decided by the Court of Appeals, in the case referred to, *supra.*

The defendant is entitled to judgment, with costs.

SUTHERLAND, J.—This case comes irregularly before the general term, and in such a form, that I do not think we can pronounce any valid judgment.

The action was tried before a jury. At the close of the plaintiff's evidence the defendant moved that the complaint be dismissed. This motion was granted; and the plaintiff excepted; and this is the only exception in the case. The justice then directed, that the case to be made be first heard at the general term.

It is plain that this was irregular. The exceptions, which, by § 265 of the Code, the judge trying the cause may direct to be heard in the first instance at general term, are exceptions taken during the trial, and not exceptions to the final judgment, or decision in the action.

The general term of this district have recently decided this very point. See Hoagland *a.* Miller, 16 *Abbotts' Pr.*, 103.

There must be a new trial, with costs to abide the event of the action.

LEONARD, J., dissented from this opinion of SUTHERLAND, J.

BARNARD, J., concurred in the opinion of LEONARD, J.

Judgment for defendant.

Contra, 18 Abb. 270

VON LATHAM *a.* ROWAN.

Supreme Court, Second District; General Term, December, 1862.

MALICIOUS PROSECUTION.—FALSE IMPRISONMENT.—ELECTION OF CAUSE OF ACTION.—PRESUMPTION OF MALICE.—UNLAWFUL INTRUSION ON REAL PROPERTY.—CITY COURT OF BROOKLYN.—NEW TRIAL.

On the trial of an action in which, from the form of the complaint, it seemed uncertain whether the damages were claimed for a malicious prosecution or a false

imprisonment, the judge, at the close of the plaintiff's case, ruled, without objection from either side, that the proof offered showed that the plaintiff sought to recover for a false imprisonment.

Held, that the case must be treated on appeal as an action for false imprisonment.

After such an election by the court, acquiesced in by the plaintiff, admissions in the answer pertinent only in an action for malicious prosecution should be conformed to and construed by the evidence, and not made the ground of liability more extended than the proofs warrant.

A person who has, without bad faith, upon oath or otherwise, merely stated his case to a magistrate having jurisdiction of the offence supposed to have been committed, and of the person accused, is not liable to an action for false imprisonment upon the consequent arrest of the accused, although such arrest is not warranted by the law or the facts in the case.

Power of the Supreme Court on appeal from the City Court of Brooklyn to grant a new trial.

Appeal from a judgment of the City Court of Brooklyn.

This action was brought by Gerard Von Latham against Thomas Rowan and William P. Libby to recover $5,000. The cause of action, as averred in the complaint, was as follows: That heretofore, and on or about the 5th day of February, 1862, the above-named defendants, at the city of Brooklyn, wrongfully and maliciously contriving and conspiring together to injure the plaintiff, caused and procured a warrant to be issued against and for the apprehension of the plaintiff, by William M. Boerum, Esq., a justice of the peace of said city; and for the purpose of procuring said warrant, and to subject the plaintiff to arrest and imprisonment thereunder, in pursuance of said contrivance and conspiracy, one of said defendants falsely made oath before said justice, in said city, that in the month of November, 1861, at the city of Brooklyn, in the county of Kings, the plaintiff did unlawfully intrude, enter upon, and take possession of the house situated and known as No. 12 Huntington-street, in said city, without license or authority of William P. Libby, the owner thereof; and that said plaintiff had and still continued to occupy said house, without the authority of the owner thereof as aforesaid, in violation of the statute in such cases made and provided. Whereupon the said justice issued his said warrant in due form of law against the plaintiff, to an officer of the metropolitan police, who thereupon, in pursuance of the requirements thereof, arrested and imprisoned the plaintiff, and forced and compelled the plaintiff to go

in custody as such prisoner, through a great many public streets and places in said city, to a certain police station-house, building, or prison, and there kept, detained, and imprisoned the plaintiff for a long space of time, and took and compelled said plaintiff to go before said justice, where the plaintiff was kept, detained, and imprisoned in a public court-room for a long space of time; that the plaintiff was forced and compelled on subsequent and other days and times to appear before said justice for examination on said charge, which was finally dismissed by said justice, the defendants failing to appear and prosecute and sustain said charge, and the plaintiff was discharged therefrom.

The plaintiff further says, that said charge was false and untrue, that there was no reasonable or probable cause therefor, or for the arrest, imprisonment, and arraignment of the plaintiff, and the defendants well knew the same. That by reason of said charge, arrest, and imprisonment, and the publication by the defendants thereof in a public newspaper, the plaintiff was greatly harrassed and annoyed, and was damaged and injured in his good name and reputation, and in his rights and feelings, and was subject and held up to public scorn, infamy, and disgrace, to his damage, &c.

The substance of the answer sufficiently appears from the opinion. At the trial, after plaintiff's opening, the defendants moved the court to compel the plaintiff to elect whether he would proceed for false imprisonment or malicious prosecution. The motion was denied, and an exception taken. At the close of plaintiff's case a similar motion was made and denied by the court, on the ground that by the proof the plaintiff rested his case on the ground of false imprisonment. An exception was again taken. Defendants then moved for a nonsuit upon the following grounds, namely: That the justice who issued the warrant had jurisdiction of the subject-matter of the complaint; that the facts set forth in the affidavit were legal evidence, and tended to make out a proper case, and the justice having decided that they made out a criminal offence, and issued his warrant accordingly, such decision was conclusive until revoked, and afforded a protection to the defendants. That the defendants having stated their case to the magistrate, and thereby merely put the court in motion, were not liable in the absence of evidence that such statement was untrue, or made in bad

faith, or maliciously. The motion was denied, and the defendants excepted. The defendants then rested. The court charged the jury that the plaintiff had made out a cause of action for false imprisonment, and the only question for them to determine was the amount of damages. That the plaintiff was entitled to full compensation for the injuries actually sustained by him. That the jury might look into the evidence to ascertain whether the defendants were actuated by malicious motives towards the plaintiff; and if they believed the defendants were so actuated, they might give damages beyond the amount of injury actually sustained by the plaintiff, by way of punishing the defendants; and that the amount of exemplary damages was within the discretion of the jury, to be reasonably and carefully exercised.

The defendants excepted to that portion of the charge which submitted to the jury the question whether the defendants were actuated by malicious motives.

The jury found a verdict for the plaintiff for $1,000. The defendants' motion for a new trial was denied. After the entry of judgment, defendants appealed from the judgment and the order refusing a new trial.

Jasper W. Gilbert, for the appellant.—I. The verdict is so manifestly and grossly excessive, as to evince partiality or corruption on the part of the jury. The City Court, therefore, erred in denying the motion for a new trial, and this court has the power to correct the error. (*Laws of* 1849, 171, ch. 125, § 4.) The exercise of the power to grant new trials is not discretionary merely, but is a judicial power, and suitors have a right to insist on the exercise of it, whenever a proper case is presented. When a statute authorizes the doing of a thing for the sake of justice, the word "may" is the same as the word "shall." (Macdougall *a.* Patterson, 11 *Com. B.*, 772, 773; Mayor, &c., of N. Y. *a.* Furze, 3 *Hill*, 612.) That the verdict was palpably and outrageously excessive, admits of no question. There was no evidence to warrant it, and "to suffer it to stand, could have no other tendency but to weaken the security of property, and lessen the respect which belongs to the administration of justice." (Fay *a.* Grimsteed, 10 *Barb.*, 321, 331.)

II. The appellate jurisdiction of the Supreme Court is com-

prehensive enough to correct such an error as this. It is submitted that this question is *res judicata* in this district at least; and it seems clear, upon looking into the City Court Act, and the Code. (*Laws of* 1850, ch. 102; *Code*, § 330.)

III. The court below erred in submitting to the jury the question, whether the defendants were actuated by malicious motives. No evidence tending to prove malice was offered.

IV. But, upon principle, and upon authority, the action cannot be sustained. 1. It is an action of trespass for false imprisonment, and not an action on the case for a malicious prosecution. It was so treated by the court, with the acquiescence of the plaintiff, and no proof of want of probable cause was offered. The distinction between these actions, and the rules governing the liability of defendants in them, is familiar. (See Pratt *a.* Gardner, 2 *Cush.*, 68; *Hill on Torts*, 479; Chadsey *a.* Brown, 3 *Stevens N. P.*, 2036.) 2. When a person maliciously, and without probable cause, institutes a proceeding which causes the arrest of another, he is liable in an action on the case. Where a person procures from a justice of the peace acting ministerially, or from a clerk of the court, illegal process under which another's person is arrested or property seized, his act, in thus extending the power of the court to a case in which it cannot lawfully be extended, makes him liable as a trespasser, independently of any question of malice or probable cause. (See Percival *a.* Jones, 2 *Johns. Cas.*, 49; Curry *a.* Pringle, 11 *Johns.*, 444; Rogers *a.* Mulliner, 6 *Wend.*, 597.) But, in order to charge the plaintiff in the suit, it should appear that it was really his act. (Percival *a.* Jones, *supra;* Gold *ads.* Bissell, 1 *Wend.*, 210; Taylor *a.* Trask, 7 *Cow.*, 249.) And when a complainant in a criminal prosecution, in addition to preferring his complaint, positively commands the arrest of the person prosecuted, he may perhaps be made liable as a trespasser. (Hopkins *a.* Crowe, 7 *C. & P.*, 373; Sowell *a.* Champion, 6 *A. & E.*, 407.) But, if a man complain to a magistrate on a subject-matter over which the magistrate has a general jurisdiction, and the magistrate, thereupon, grant a warrant, under which the party complained against is apprehended, the complainant is not liable as a trespasser, although the particular case be one in which the magistrate had no authority to act. (1 *Arch. N. P.*, 505; West *a.* Smallwood, 1

Mees. & W., 418.) For the act amounted to no more than calling upon the magistrate to exercise his jurisdiction. (Mills *a.* Callett, 6 *Bing.*, 85; approved in Stewart *a.* Hawley, 21 *Wend.*, 555; Brown *a.* Chapman, 6 *Man. Gr. & S.*, 366; S. P., Lock *a.* Ashton, 12 *Ad. & El., N. S.*, 871; Shaw *a.* Reed, 16 *Mass.*, 450; Brown *a.* Crowl, 5 *Wend.*, 298; Peckham *a.* Tomlinson, 6 *Barb.*, 253; Easton *a.* Callendar, 11 *Wend.*, 90; Hunt *a.* Wickwire, 10 *Ib.*, 102; Stanton *a.* Schell, 3 *Sandf.*, 323; Case *a.* Shepherd, 2 *Johns. Cas.*, 27.) 3. The magistrate had jurisdiction of the subject-matter, and of the person of the plaintiff, and his error, if any was committed, was a judicial one; and for this an action does not lie against the court, the party complainant, or the officer who made the arrest. (Case of the Marshalsea, 10 *Co.*, 76, a; Stewart *a.* Hawley, 21 *Wend.*, 552; Gwinne *a.* Pool, 2 *Lut.*, 1562; Buquet *a.* Watkins, 1 *Mill*, 131; 1 *Smith Lead. Cas.*, 4 ed., 219, *note*; *Cor. & Hill's N.*, 1016.)

V. There is no allegation in the complaint that the facts sworn to before the magistrate do not constitute a criminal offence, or that the magistrate acted without jurisdiction; and it may well be contended that such facts do make out a misdemeanor within the statute. (*Laws of* 1857, 805, ch. 396.)

James Troy, for the respondent.—I. The question as to whether the damages are excessive or not, was disposed of upon the motion to set aside the verdict, and the judgment cannot be disturbed upon that ground. (Thurber *a.* Townsend, 22 *N. Y.*, 517; Oldfield *a.* N. Y. & H. R. R. Co., 14 *Ib.*, 310.)

II. The complaint charges that the defendants conspired together to procure the arrest of the plaintiff, and for this purpose one of the defendants, in pursuance of the conspiracy, made an affidavit upon which the warrant was issued, &c. The answer of the defendants admits that they procured the warrant; if the affidavit upon which the warrant was procured charged no offence, the magistrate acquired no jurisdiction, and the liability of the defendants is too well settled to be discussed. (Wilson *a.* Robinson, 6 *How. Pr.*, 110; Williams *a.* Garrett, 12 *Ib.*, 456; Lansing *a.* Case, 4 *N. Y. Leg. Obs.*, 221; Curry *a.* Pringle, 11 *Johns.*, 444; Vredenburgh *a.* Hendricks, 17 *Barb.*, 179; Tompkins *a.* Sands, 8 *Wend.*, 462; Gold *ads.*

Bissell, 1 *Ib.*, 210; Blythe *a.* Tompkins, 2 *Abbotts' Pr.*, 468; Comfort *a.* Fulton, 13 *Ib.*, 276.)

III. The affidavit charged no offence at common law or under any statute; it gave the justice no jurisdiction. The warrant upon its face was void, and would not even protect the officer who executed it; this was not disputed in the court below.

IV. But it was and is claimed that the justice acted judicially in determining if an offence had been committed. If this be so, he acted ministerially in issuing the warrant. (See Rogers *a.* Mulliner, 6 *Wend.*, 597.) The magistrate, however, did not act judicially.

V. To act judicially, a magistrate must first acquire jurisdiction; to effect this, a crime must be charged. In this case no offence was charged either with or without oath, in terms or in substance, nor does it appear that the justice determined any thing about it. The principle contended for by the defendants would substitute the mere opinion of a justice, as to what constitutes an offence, for the definite expression of the law; would dispense with any further declaration by the Legislature of what constitutes crimes, and acts would thereafter be harmless, or criminal, as different justices might view them.

VI. It is entirely immaterial, in this action against the persons procuring the warrant, whether the justice acted judicially or not; the liability of the former in no manner depends upon that of the latter. A justice may be (and undoubtedly is) exempt from liability from error in the exercise of judicial functions, when he has jurisdiction, no matter how grievous the consequence of his error may be; but it does not follow, that the persons who in bad faith for private ends and oppressive purposes, procure him to act, are equally inviolate. That the justice acted judicially, therefore (even if it were so), is no defence to this action. (See Rogers *a.* Mulliner, 6 *Wend.*, 597.)

VII. It was not incumbent on the plaintiff to prove malice; in fact, legal malice was implied from the wrongful acts.

By the Court.*—Emott, P. J.—The complaint in this case seems to have been framed to state a cause of action for a malicious prosecution, and the answer was probably drawn to meet

* Present, Emott, P. J., Brown and Lott, JJ.

such a case. At the trial, however, by the ruling of the judge, and apparently without objection by either party, the action was considered and tried as if brought for a false imprisonment. The defendants' counsel insisted at the outset that the plaintiff should be compelled to elect whether he would proceed for false imprisonment or for malicious prosecution. Such an election, although refused by the judge at that stage of the trial, was in effect made by him for the party at the close of the testimony, when he is stated to have decided that the action rested on the ground of false imprisonment.

The defendants' counsel did not except to this ruling, although he did except to the refusal to compel an election. The judge afterwards charged the jury that the plaintiff had made out a cause of action for false imprisonment, and to this instruction the defendants' counsel did not except. He also left it to the jury to determine from the evidence whether the defendants were actuated by malicious motives, adding that if the jury thought they were, they might give smart-money in the verdict against them. The defendants' counsel excepted to the submission of the question of malice to the jury, but he evidently did so with reference to its effect upon the question of damages, and on the ground that if there were no proof of actual malice, the plaintiff, although entitled to a verdict, should have recovered for his unlawful imprisonment only his actual damages. Upon the theory, however, that the action was for a malicious prosecution, proof of actual malice was vital to the support of the action, and not merely to the question of damages. The question of malice in such cases is always a question of fact, and must be submitted to the jury, while the existence of the other requisite essential to the action, a want of probable cause, is to be determined by the court as a question of law. In the present case the theory of an action for a malicious prosecution seems to have been abandoned by both parties, the plaintiff going for a false imprisonment, under the intimation of the court, and the defendants omitting to ask for any ruling or instruction, or to take any exceptions, which would raise the question whether a case of malicious prosecution was made out. I shall not, therefore, consider how far the evidence could sustain an action for malicious prosecution, or what disposition would be made of the various questions which might arise

upon the evidence, if applied to such a case. The exception which has just been noticed, to the remark of the judge that the jury might look into the evidence for proof of malice, would require some consideration upon the question of damages, if an action for false imprisonment will lie on the present state of facts, but it will not be material to discuss that question until the liability of the defendants in such a form of action is first decided.

The only exception at the trial which can present this question is that taken upon the refusal to nonsuit the plaintiff. The same question may possibly be presented by the motion for a new trial upon the minutes, although here the defendants would be embarrassed by the fact that the direct instruction to the jury, that the action would lie, was not excepted to; so that, after all, upon that motion, as well as upon this appeal, they must rely upon their motion for a nonsuit.

The facts in the case are few and undisputed. The defendant Libby was the owner of a house and lot in the city of Brooklyn, and the defendant Rowan seems to have been his agent. On the 5th of February, 1862, Rowan made an affidavit before a police magistrate that the plaintiff had unlawfully intruded into and taken possession of the house owned by the defendant Libby without his consent, and continued to occupy it without his authority. Upon this affidavit the magistrate issued a warrant reciting the charge, and commanding the arrest of the plaintiff to answer it as a violation of the statute in such cases. The plaintiff was arrested, and pleaded to the charge. He was suffered to go upon his own promise to appear, Rowan appearing against him. The case was adjourned three times, and upon the last hearing, Rowan not appearing, the complaint was dismissed, and the plaintiff was discharged. It will be seen that there is no proof connecting the defendant Libby directly with the transaction, and all that there is in the case to make him liable to the plaintiff in an action for false imprisonment is the admission in the answer that he, as well as the defendant Rowan, procured the warrant to be issued upon which the plaintiff was arrested, and the fact appearing in the proceedings before the justice that Libby was the owner of the house into which the plaintiff was charged with intruding.

The statute under which the proceedings against the plaintiff

were taken is chapter 396 of the Laws of 1857. (1 *Laws of* 1857, 805, ch. 396.) The first section of this act provides, among other things, that any person who should thereafter intrude upon any lot or piece of land situate within the bounds of any incorporated city or village without the consent of the owner thereof, should be deemed guilty of a misdemeanor. It is not disputed that the magistrate to whom the complaint was made had general criminal jurisdiction to issue process for the arrest of persons charged with any crime or misdemeanor of whatever degree, nor that he had jurisdiction to try and to convict the plaintiff, if he were guilty of any offence under the statute. The difficulty in the proceedings of the defendants, which caused the complaint to be dismissed, seems to have been that the plaintiff was charged with intruding into a house, and not upon a lot of land, and that Libby was not stated in the complaint or warrant to be the owner of any lot or piece of land. It is therefore contended that neither the affidavit nor the warrant state or show the commission of any offence by the plaintiff; and for this reason the present defendants were held liable, upon the trial of the present suit, for false imprisonment in the plaintiff's arrest.

The only connection of the defendants with the arrest or detention of the plaintiff, assuming that Libby is responsible in the same manner as Rowan, and for all his acts, is, that they stated their case to the magistrate, charging the plaintiff with a misdemeanor, upon the facts which they swore to and asked for his arrest. The answer indeed states that they "procured the warrant to be issued;" but as this answer was probably drawn to meet a charge of malicious prosecution, I think its statements and admissions should be conformed to or construed by the evidence, and not made the ground of a liability more extended than the proof warrants. There is no evidence of any undue interference to procure an arrest of the plaintiff, or of any thing more than a statement of the case to the magistrate upon oath. The defendants are not shown to have participated personally in the arrest. Rowan appeared at two or three hearings before the magistrate to support it, but finally abandoned it, or for some other reason failed to appear, and the case was dismissed by the justice.

It must be allowed that there is some uncertainty in the decisions, or perhaps in the language of judges, especially in our

courts, and in some recent cases with reference to a question of this nature. In Wilson *a.* Robinson (6 *How. Pr.*, 110), an answer to an action for false imprisonment, alleging that the defendant made a certain complaint to a magistrate averring a particular state of facts upon affidavit, upon which the magistrate issued a warrant, and the defendant was arrested, which was the imprisonment complained of, was held insufficient upon demurrer. The argument was at special term, and the judge remarks that no criminal offence was charged in the affidavit or warrant, and none was pretended to have been committed. A case may undoubtedly be supposed where a complaint should be made and a warrant issued for an act plainly lawful. Such a proceeding could hardly be in good faith. But if the case referred to would hold a party, who made a complaint charging a clearly criminal offence to a magistrate, liable for a consequent arrest made by the direction of the magistrate, because the facts stated or proved did not make out the offence charged, I should hesitate to accept the rule. The case of Comfort *a.* Fulton (13 *Abbotts' Pr.*, 276) does not seem to have been very carefully considered. The action of false imprisonment could undoubtedly be sustained in that case, upon the last ground intimated by Judge Gould, that the defendants were conspicuous actors in the imprisonment of the plaintiff.

There is another class of cases, in which officers having a peculiar and limited jurisdiction to issue process of a special nature in certain cases, having arrested individuals by such process in cases not within such authority or jurisdiction, both the officers and the parties obtaining the process have been held liable for false imprisonment. Thus in Curry *a.* Pringle (11 *Johns.*, 444), the defendant procured from a justice a warrant instead of a summons, without any oath of the facts which would authorize the justice to issue a warrant, and the plaintiff was not liable to arrest under the statute. (So in Gold *ads.* Bissell, 1 *Wend.*, 210; and in Rogers *a.* Mulliner, 6 *Ib.*, 597.)

But these were instances where the jurisdiction of the officer to issue such a process was special, and confined to cases which were brought within the statute creating it, and where no steps being taken to give or to show such jurisdiction, the proceeding was absolutely without any authority or color of justification. Vredenburgh *a.* Hendricks (17 *Barb.*, 179) was a case of a

similar nature, against a defendant who had taken out a warrant under the non-imprisonment or fraudulent debtor act, upon an affidavit which was wholly insufficient to give the officer jurisdiction or authority to act. These cases are distinguishable from the present, because here the magistrate had a general jurisdiction of the subject-matter, to wit, arrests of persons charged with crimes, and of the person accused. The affidavit of Rowan stated a wrongful act on the part of the plaintiff, which he claimed was an offence under the statute. Rowan is not shown to have done more than to state his case to the magistrate. There is nothing in the evidence to impute bad faith to him, nor do I find any evidence of actual malicious motive on his part. He may have been mistaken in supposing that the facts which he stated constituted an offence under the act referred to, or he may have omitted to state in his affidavit some fact which was necessary to constitute such an offence. But so long as he did no more than to state his case, and that without bad faith or malice, he was not, in my opinion, liable for the consequent action of the magistrate, even if it were erroneous. I do not say that he would be exempt from liability if he was shown to have acted maliciously and in bad faith; although the character and extent of his liability would present another question: but an erroneous view of the law or of his right would not of itself convict him of bad faith. If his liability to an action depended upon the maliciousness and bad faith of his complaint, that should have been submitted to a jury as the principal question; and there should be, as I have said, something more in the case to show it, than the insufficiency of his allegations to establish the commission of a criminal offence. If the defendants had actively and personally participated in the arrest of the plaintiff a different rule would apply, as it would also if the act complained of was clearly and unquestionably lawful. But I am not prepared to admit the doctrine that a party who merely states his case to a magistrate, complaining of a wrongful act as criminal, is liable to an action of false imprisonment if the magistrate upon that statement issues process, which in the event cannot be justified by the law or the facts of the case.

The contrary rule has been expressly asserted by the highest authority in the English courts. Thus in Canatt *a.* Morley

(10 *A. & E., N. S.*, 18), Morley sued Canatt and obtained judgment by default, and process against him in a Court of Requests, when his residence was in a place which was expressly exempted from the jurisdiction of the court. Canatt afterwards brought false imprisonment against Morley, the commissioners of the Court of Requests who signed the warrant, and the officer who arrested him. The Court of King's Bench held that the commissioners and the officer were liable, but Morley, the plaintiff, was not; and Lord DENMAN said, "A party who merely originates a suit by stating his case to a court of justice is not guilty of trespass, though the proceedings should be erroneous or without jurisdiction." In Barber *a.* Rollinson (1 *C. & M.*, 330), the defendant laid an information against the plaintiff, charging him with a felony. Upon his arrest he was dismissed by the magistrate, on his promise to appear in a week. As he was leaving, the defendant interposed another charge, and he was again put to the bar and held under a similar promise. No foundation existed for the charges, and they were dismissed. But Lord LYNDHURST, and the Court of Exchequer, held that the defendant could not be made responsible for false imprisonment. In West *a.* Smallwood (3 *M. & W.*, 418), Lord ABINGER laid down the rule with great distinctness. That was a case quite similar to the present. The plaintiff was a builder, and dispute arose between him and the defendant, for whom he was building; the plaintiff ceased work, and the defendant lodged a complaint with a magistrate, and had him arrested under a special statute known as the Master and Servant Act. On a hearing the complaint was dismissed, the case not being within the act. The plaintiff then sued in trespass for false imprisonment, but was nonsuited at the trial. The nonsuit was sustained by the Court of Exchequer, and Lord Ch. B. ABINGER said, "When a magistrate has general jurisdiction on the subject-matter, and a party goes before him and lays a complaint upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as trespasser, but the only remedy against him is by an action on the case, if he has acted maliciously." Equally strong is the doctrine of the judges of the Common Pleas in Brown *a.* Chapman (6 *Mann., Gr. & S.*,

365), which was a case where an arrest had been made which was not justified by the facts. The court say, "The acts of the defendant appear to us no more than calling on the magistrate to exercise his jurisdiction;" and add, "If an individual prefers a complaint to a magistrate, and procures a warrant to be granted upon which the accused is taken in custody, the complainant in such case is not liable in trespass for the imprisonment, and that although the magistrate had no jurisdiction." A similar principle was applied by the Supreme Court in this State, in Stewart *a.* Hawley (21 *Wend.*, 552). A justice issued a warrant, and an officer arrested the plaintiff for what was charged to be a violation of the act for the observance of Sunday. It was held, that although the facts stated did not constitute such an offence, yet the magistrate and the officer were protected, and could not be made responsible in trespass, but only for a malicious prosecution, if it were such. The rule as to the liability of the complainant, in cases where the complaint is insufficient or unfounded, must be the same whether the error or the failure to sustain the charge of a criminal offence be upon the law or the facts. If a man in good faith prefers a charge against another, upon which a magistrate causes his arrest, and the claimant fails to substantiate his charge by the evidence, he certainly is not liable to an action for false imprisonment. He is no more liable to such an action when he simply states the facts, and states them correctly, to a magistrate having jurisdiction to arrest for the offence charged, and of the person accused, and the magistrate incorrectly concludes that an offence was committed, and so orders an arrest, which is subsequently terminated by the discharge of the accused because the magistrate was in error as to the law, and the facts did not constitute a crime. Any other rule would be most hazardous to innocent parties, who could never venture to make a criminal complaint, without incurring the risk of an action for the arrest, if they were either mistaken as to the facts or ill advised upon the law.

The general principle stated in the case of the Marshalsea (10 *Co.*, 65, 76), is not at variance with the views which have now been indicated. "When a court," it is said by this venerable authority, "has jurisdiction of the cause, but proceeds *inverso ordine*, or erroneously, the party who sues or the offi-

cer who executes the process or precept of the court, no action lies against them. But when the court has not jurisdiction of the cause, the whole proceeding is *coram non judice*, and actions will lie against them without any regard of the precept or process." In the case of a complaint charging a criminal offence to a competent magistrate, such an officer has jurisdiction of the cause. His jurisdiction does not depend upon any special condition precedent to his power to issue process, but is general, as that of a civil tribunal. He is to determine whether sufficient grounds exist in law and fact to arrest any person charged by another with a criminal offence. If such a magistrate determine to make, and proceed to direct, such an arrest, a party who has merely stated the case to the magistrate is not a trespasser, although the arrest should be wholly unjustifiable in law or in fact.

In the present case, the defendants were held liable to an action for false imprisonment because the facts which they stated to the justice did not constitute a criminal offence; and the latter held that they did, and therefore arrested the defendant. We are of opinion that this would not sustain such an action, and that the very excellent and capable lawyer who presides in the city court of Brooklyn fell into an error in holding the defendants liable for false imprisonment, and refusing the nonsuit which was asked.

The judgment should be reversed, and a new trial ordered at the City Court.

HANKINSON *a.* GILES.

Supreme Court, First District; General Term, March, 1864.

MALICIOUS PROSECUTION.—PROBABLE CAUSE.—CONSTRUCTION OF STIPULATION.—IDENTIFICATION OF PAPERS.—EVIDENCE.

In an action for malicious prosecution, a stipulation identifying certain affidavits as the originals upon which a warrant for the arrest of the plaintiff was issued, and admitting that the plaintiff was arrested upon such warrant, does not authorize the defendant to read such affidavits in evidence.

So held, where the stipulation, though produced on the trial by plaintiff, was signed by the defendant's attorney only.

Nor is the case altered by plaintiff's first reading in evidence, under such stipulation, defendant's affidavit, made before the magistrate.

Exceptions heard at general term in the first instance.

This action was brought by Samuel Hankinson against William M. Giles, to recover $5,000 damages for an alleged malicious prosecution. The defendant caused the plaintiff to be brought before a police magistrate, on a charge of libel, in publishing and circulating a scurrilous poem, entitled "Misther Giles." The magistrate required bail, to answer an indictment: the plaintiff was indicted, but was acquitted upon his trial. On the trial of the present action, during the direct examination of the plaintiff, his counsel read in evidence the affidavit of Giles, made before the police magistrate, and a copy of the libel annexed to it. The case stated that these papers were read under the following stipulation, which was signed only by defendant's attorney:

It is mutually admitted that the affidavits and papers marked "R. K., January 20th, 1862," are the affidavits and papers upon which Richard Kelly, Esq., then being a police magistrate of the city of New York, issued a warrant for the arrest of the plaintiff in this action, and that by virtue of such warrant the said plaintiff was arrested by officer Scott and brought before said magistrate. That an examination was had before such magistrate upon the matters and things embraced in such papers, which examination is annexed to said papers.

It is further admitted that the said Kelly will testify, that after such examination the said plaintiff was ordered to find bail in the sum of $500 to answer the said matters, and did find such bail, and that after diligent search the original warrant cannot be found.

During the cross-examination of the plaintiff, he testified:

Q. When you went down to Jefferson Market (the police court), was a Mr. Angier there? *A.* He was, I think.

Q. He made his statement to the magistrate? *A.* I believe he made a statement; I never heard his statement.

Q. He was there at the time you were taken down to Jefferson Market? *A.* Yes, sir, he was there.

Q. He and Giles? *A.* Yes, sir.

Q. You know this Angier? *A.* Yes, sir; I think I know him when I see him.

Q. He was a witness; he made an affidavit before Judge Kelly at the time? *A.* I don't know.

Q. You know he was there, making a statement with Giles? *A.* I saw him there; I don't know whether he made a statement or not; I cannot say; he did not make it in my presence.

Defendant's counsel here offered to read the affidavit of Calvin Angier.

Objected to; objection overruled and exception taken.

The affidavit was then read, as follows:

"That Tuesday night, September 27th, 1859, at about half-past 8 o'clock, he was going to his residence, No. 63 West 13th-street, and when directly opposite his house in said 13th-street, he saw a man stooping down at his (deponent's) front door, as if putting something under the door; that said man, whom deponent identified to be a Dr. Hankinson, who resides within a few houses on the same side of the street with deponent, then came down the said stoop and went towards his own house, and disappeared; that deponent then went into Macy's store on the corner of 13th-street and 6th Avenue, as said Hankinson's house adjoins Macy's on the street, as deponent supposed that he had gone into said store, but said Hankinson was not there.

"Deponent further says, that soon after he went to his house, and upon opening his front door, he found there a yellow (sealed) envelope without any address; that upon breaking the seal he found said envelope to contain some printed rhymes of an obscene and disgusting character, called '*Misther Giles; a Poem by Somebody; respectfully dedicated to the New York Apothecary, corner of* 13*th-street and* 6*th Avenue;*' that said envelope contained two copies of said rhymes, one of which he gave to Mr. Giles, and which copy is now annexed to Mr. Giles' affidavit.

"CALVIN ANGIER.

"Sworn to before me, September 29, 1859.

"RIC'D KELLY, *Police Justice.*

"Marked 'R. R.,' January 20th, 1862."

At the close of plaintiff's case, defendant moved to dismiss the complaint, on the ground that plaintiff had not shown want of probable cause. The motion was granted, and plaintiff excepted; the court (Mr. Justice BALCOM) directed that the exceptions be heard at the general term in the first instance.

William R. Stafford, for the plaintiff.—I. The court erred in assuming that there was no dispute as to the facts tending to show probable cause. While the rule is admitted that the court is to determine what facts amount to probable cause, and so instruct the jury, still, if there is any question as to those facts, it must be submitted to the jury. (Bulkeley *a.* Keteltas, 10 *N. Y.* (6 *Seld.*), 384; Garrison *a.* Pearce, 3 *E. D. Smith*, 255.)

II. The fact that the defendant shortly after the arrest, but before the indictment, was informed of his mistake, and then declared "that he did not care; that he was bound to break the plaintiff up, and have him out of the city," was not only evidence of malice, but sufficient to sustain a verdict that the party uttering it did not have that reasonable belief in the plaintiff's guilt which justified the prosecution. (Weaver *a.* Townsend, 14 *Wend.*, 192.)

III. The affidavit of Angier was made after the arrest, and is incompetent as evidence in this case. Though controverted, it could have no greater effect than the declarations of any third party, and as such, was improperly received. Admitting it, however, would not justify the assumption that its statements were true in the face of the evidence contradicting it. (Burt *a.* Place, 4 *Wend.*, 591.)

IV. Until, therefore, the defendant had explained the proof tending to show that he did not act upon "a reasonable suspicion founded on circumstances warranting a cautious man in the belief" that the plaintiff was guilty of the offence charged (Foshay *a.* Ferguson, 2 *Den.*, 617), it was error to take the case from the jury, and the nonsuit should be set aside.

John Graham, for the defendant.—I. The judge at the trial ruled correctly in allowing the affidavit of Angier, taken before Justice Kelly, to be read in evidence. 1. It was one of the affidavits on which the justice issued his warrant, and went to

the question of probable cause. One of the important inquiries was, the basis or ground of complaint as urged or presented to the justice. 2. The affidavit was a part of a record from which the plaintiff had already read—namely, in introducing the affidavit of the present defendant, made at the same time, and on the same occasion. 3. It was offered on the cross-examination of the plaintiff, after the defendant's affidavit had been introduced on his direct.

II. The judge, at the trial, acted correctly in dismissing the complaint. 1. The question of probable cause, where the facts are undisputed, as they were in this case for the purposes of the motion to dismiss the complaint, is one of law for the court, and was, in this case, properly decided. (Besson *a.* Southard, 10 *N. Y.* (6 *Seld.*), 236; Bulkeley *a.* Ketçltas 6 *N. Y.* (2 *Seld.*), 384.) 2. If there was probable cause for starting the prosecution, its ultimate failure did not remove the difficulty out of the way of the plaintiff's action. There was clearly such cause in the affidavit of Angier alone. (Burlingame *a.* Burlingame, 8 *Cow.*, 141; Murray *a.* Long, 1 *Wend.*, 140.) 3. Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged. (Foshay *a.* Ferguson, 2 *Den.*, 617.) 4. The verdict of the jury in favor of the plaintiff, on the trial of the indictment for libel, would not destroy the existence of probable cause, if it existed when the prosecution was started. The jury performed their duty by a different standard from that which governed before the inquiring magistrate. Before him, doubts weighed against the plaintiff. Before the jury, doubts belonged to him. (2 *Rev. Stat.*, 709, § 21.) 5. The jury impannelled to try the indictment against the plaintiff, retired and deliberated before they acquitted him. (2 *Stark. on Slander*, 79, m.)

By the Court.—Sutherland, J.—It does not require any argument or authority to show that, independent of the stipulation on page 8 of the case, it was error to permit Calvin Angier's affidavit to be read in evidence for the defendant under objection.

In my opinion, the stipulation signed by the attorney for the

defendant only, did not authorize him to read Angier's affidavit in evidence.

Had the stipulation been signed by the attorney for the plaintiff also, I do not think it would have authorized the defendant to read it in evidence, although it might have authorized its production and identification as one of the affidavits or papers upon which Kelly, the magistrate, issued a warrant for the arrest of the plaintiff. The inference from the case on page 8, perhaps is, that the plaintiff produced the stipulation and read the defendant's affidavit in evidence; and if he did, in my opinion this did not authorize the defendant to read Angier's affidavit in evidence, as evidence of the facts stated therein.

It is plain, that the reading of Angier's affidavit in evidence might materially have injured the plaintiff.

I think the order dismissing the complaint should be reversed, and a new trial ordered, with costs to abide the event.

Leonard, J.—I concur. The stipulation gave the defendant no authority to read any affidavit. Nor did the reading of Giles' affidavit by the plaintiff authorize the reading by defendant of another sworn by Angier, although annexed to the former, and forming part of the papers on which the magistrate issued his warrant.

Clerke, J., concurred.

MATHEWS *a.* DURYEE.

Supreme Court, First District; General Term, March, 1864.

Dower in Surplus Moneys.—Gross Sum.—Annuity Tables.—Widow's Demand.—Interest.—Former Adjudication.—Parties.—Assignee for Benefit of Creditors.—Representative Capacity.

The surplus money arising on a sale of land under mortgage foreclosure, stands in the place of the land in respect to those having liens or vested rights therein. Thus, the widow of the owner of the equity of redemption is entitled to dower in the surplus, as she was in the land before the sale.

The widow of the owner of the equity of redemption is not barred of her right to dower in surplus moneys arising on a foreclosure, by her failure to assert her claim in proceedings to obtain the surplus, where the person to whom such surplus has been paid has not been induced to take any action or part with any thing, and has sustained no injury, by the widow's neglect.

So held, in favor of a doweress against her husband's assignee.

Nor is the right of dower in such case barred by the pendency of an action by the assignee, asking the direction of the court in distributing the fund, in which action the doweress, though a party defendant, failed to answer.

A former adjudication, as a bar, is limited to questions in issue, or which the claimant was bound to raise therein, and to persons legally before the court.

The title of an assignee, for benefit of creditors, to surplus moneys arising upon the foreclosure of a mortgage given by his assignor, is of no higher degree than that of a creditor having a lien upon the land by judgment before the foreclosure sale. The right of the widow of the assignor to dower is paramount to either.

The consent of a doweress to accept a certain amount in lieu of dower, may be inferred from her claim to the benefit of a judgment in her favor for such amount, in an action to recover her dower.

Where a widow demanded dower in surplus moneys received by her husband's assignee, the latter making no objection to the form or extent of the demand, —*Held*, that a refusal of the demand subjected the assignee to a liability for interest on the amount to which the doweress was entitled.

The sum in gross to be allowed by judgment to a widow in lieu of dower from a fund treated in equity as land, is properly estimated on the basis of the annuity tables, adopted by Rule 84 of the Supreme Court.

An assignee for the benefit of creditors represents, in his capacity as assignee or trustee, all the creditors of the estate, and they are not necessary parties to an action for a payment out of the fund.

Appeal from a judgment.

This action was brought by Sarah A. Mathews against Sackett L. Duryee, Charles S. Mathews, Jr., Annie E. Hayes, and Sophie S. Mathews, to recover dower in certain surplus moneys arising after sale on foreclosure. Charles S. Mathews, the husband of the plaintiff, was seized in fee, during marriage, of certain real estate mentioned and described in the complaint. Such real estate was incumbered by certain mortgages—two executed by Mathews and wife, and one by Mathews alone, the latter being for part of the purchase-money. On 30th September, 1857, Mathews assigned all his property to the defendant Duryee, in trust for the benefit of his creditors, including said real estate. Afterwards the mortgages were foreclosed by actions, and judgments of foreclosure and sale entered, to which actions Mathews and his wife, the plaintiff, and the defendant

Duryee, with others, were made parties defendant. The plaintiff did not appear in said actions. After sale on such foreclosures there was a surplus of $11,007.87. The defendant Duryee, as assignee, made regular application for such surplus; and after due and regular proceedings had, the same was awarded to him by order of court, in April, 1859, no one opposing.

His widow, the plaintiff, now claimed dower in this surplus. She was forty-five years old.

In 1859, Duryee brought an action in the Supreme Court for the purpose of settling the rights of certain creditors in the assigned estate, in which action plaintiff and her husband were made parties defendant.

The action was still pending. Plaintiff did not appear in that action, nor did she join her husband in the assignment, nor had she released her right of dower in any manner. Charles S. Mathews died February 1st, 1861. The defendants, other than Duryee, were, in this action, the heirs-at-law of Charles S. Mathews, deceased.

Duryee only answered. There were numerous creditors of Charles S. Mathews, whose claims had not been fully paid.

Plaintiff had demanded dower in this fund before suit.

The defences relied upon by Duryee were: 1. That plaintiff was concluded by the orders directing the surplus to be paid to Duryee, as owner of the equity of redemption. 2. That plaintiff was bound to assert her right of dower in the action brought during the life of her husband, to settle the rights of creditors, &c. 3. That this action must fail, because the creditors of Charles S. Mathews were not made defendants.

The court, at special term (Mr. Justice Peckham), rendered judgment in favor of the plaintiff for $2,225.21, with interest and costs, against the fund in Duryee's hands.

Duryee appealed.

Marsh, Coe & Wallis, for the appellant.—I. By the proceedings in the foreclosure actions, and the proceedings in said action in relation to the surplus moneys, the plaintiff is precluded from maintaining the present action for dower in such surplus. 1. She was a party defendant, and duly served. She did not appear. This omission was from her own choice, and cannot prejudice the rights of other parties. She had, in that action,

different modes of protecting her interest. She availed herself of none of them, but neglected them all. 2. On the sale under this decree of foreclosure, the surplus moneys were paid into court, pursuant to the statute and rule of court. (2 *N. Y. Stat. at Large*, 200, § 159; *Rule*, 72.) An order was duly obtained in this case, on notices filed with the clerk where each of the reports were filed, directing the payment of such surplus to the defendant as assignee of the mortgagor; all which proceedings were regular, according to the rules and practice of this court. 3. The plaintiff, by neglecting to appear in the foreclosure suit, and by neglecting to file her claim for such surplus, has lost her rights therein. The law holds her to the abandonment. The recent cases which have more particularly established the wife's right to dower in such surplus moneys, have been decided on her application while such moneys were still in the custody of the court. (Denton *a.* Nanny, 8 *Barb.*, 618; Vartie *a.* Underwood, 18 *Ib.*, 561.) The fact that the plaintiff remained inactive and silent so long, when she had every opportunity of making her claim, will be construed by law into an abandonment; or the prosecution of her claim now, as a fraud upon the rights of third parties, to whom the moneys were legally awarded. (Dougrey *a.* Topping, 4 *Paige*, 94.) It is immaterial whether the plaintiff had notice of the proceedings in relation to the surplus moneys or not. She was a party to the original foreclosure actions, and by not appearing, waived her right to notice. The general rule is, that where a party to an action can enforce a remedy therein, but neglects to do so, he cannot resort to a new action for the same relief without excusing his neglect. (Van Cleck *a.* Clark, 38 *Barb.*, 316. See Canfield *a.* Monger, 12 *Johns.*, 347.) That matter which would have been a defence to an action, cannot be made subject of a subsequent suit. 4. The order of the court, disposing of these surplus moneys, is conclusive on all parties, and cannot, in this action, be disturbed. The only mode of changing the disposition of this fund, as made by the order in the foreclosure case, was either to move, in that action, to open or amend that order, or to appeal therefrom. It cannot be assailed by a new action. 5. This order of the court disposing of the surplus moneys is in the nature of a former adjudication, and, as such, concludes the plaintiff and protects the defendant. (Acker *a.* Ledyard, 8 *N.*

Y. (4 *Seld.*), 62; Burr *a.* Bigler, 16 *Abbotts' Pr.*, 177, 183.) 6. The plaintiff should have set up her claim in the action brought by the defendant for the settlement and closing up of his matters as assignee.

II. There is no evidence or admission in the case that the defendant Duryee had, at the time of the commencement of this action, or since, sufficient funds in his hands to pay the plaintiff's claim, or any funds.

III. The judgment for the specific sum of $2,340.35 is erroneous, and cause for reversal. Because, 1. It does not appear from the case on what basis the judge made his calculation. For aught that appears, it may have been a mere arbitrary decision. If it shall be said that it was an attempt to get at her rights on the annuity principles established by Rule 84, then the judgment is erroneous, because there is not proved any agreement or consent to accept a gross sum in lieu of her dower interest, as required by said rule. 2. The judge found the sum of $2,255.21 to be the amount of her dower-right in said surplus funds at the time of the trial. And then allowed interest on that sum from the commencement of the action. This is manifestly erroneous.

IV. No sufficient demand, before suit, was proved on the trial. The demand simply was "of her dower in the surplus fund."

V. The admitted creditors of Mathews should have been made parties defendant. They have an interest in the matter adverse to that of the plaintiff, and also have a right to be heard on the application of the plaintiff, for the disposition of the fund which is *prima facie* for their benefit.

Wesley Gleason, for the respondent.—I. Plaintiff's right in the surplus was paramount to that of mortgagor, mortgagee, or creditors, and could not be tried in, or affected by, the foreclosure suits. Dower is a legal right, arising anterior to the execution of the mortgages. (Corning *a.* Smith, 6 *N. Y.* (2 *Seld.*), 82; Lewis *a.* Smith, 9 *N. Y.* (5 *Seld.*), 502; Hawley *a.* Bradford, 9 *Paige*, 200; Tabele *a.* Tabele, 1 *Johns. Ch.*, 45; Denton *a.* Nanny, 8 *Barb.*, 618.) Nor is it material whether the sale, under the foreclosure decrees, was before or after the death of her husband. (Vartie *a.* Underwood, 18 *Barb.*, 561;

Denton *a.* Nanny, 8 *Ib.*, 618; Mills *a.* Van Voorhies, 20 *N. Y.*, 412, 420.) Plaintiff's dower-right in the surplus fund could only be tried by a direct proceeding for that purpose. (Badgley *a.* Bruce, 4 *Paige*, 98; Banks *a.* Walker, 3 *Barb. Ch.*, 438–450.)

II. There is no pretence that plaintiff had notice of the application of Duryee for this surplus fund. Her rights could not be affected by the orders directing this fund to be paid to Duryee: 1. because no notice was given; 2. because equity did not require the plaintiff to assert an inchoate right of dower. Her husband was then living. Plaintiff is presumed to have been under her husband's control. "Dower is highly favored in equity, and that the doweress is in the care of the law, and a favorite of the law." The orders directing this fund to be paid to Duryee, adjudicated nothing as to plaintiff's dower-right. (Banks *a.* American Tract Society, 4 *Sandf. Ch.*, 438.) Nor could plaintiff be estopped without notice.

III. Plaintiff's right of dower could not be tried in, or affected by, the action to settle the rights of creditors. Her rights were paramount to any the assignment could confer. (Banks *a.* Walker, 3 *Barb. Ch.*, 438–450; Lewis *a.* Smith, 9 *N. Y.* (5 *Seld.*), 502.) The assignee can have no greater right to the fund than the creditors, and they can only claim the residue, after her dower is satisfied. (Hawley *a.* Bradford, 9 *Paige*, 200.) It would be a denial of plaintiff's rights to require her to share the burden of an expensive litigation between creditors, or wait until the rights of parties with whom she had no interest in common were determined. The right which she seeks to recover in this action had no existence when the action was brought by the assignee. Her husband was then living. Her dower-right accrued upon his death. Plaintiff could not litigate the dower-right in the suit brought by the assignee, because the heirs-at-law were necessary parties in her action for dower. No such right as plaintiff seeks to recover in this suit existed when the action referred to in the answer of Duryee was brought.

IV. The creditors of Charles S. Mathews were neither necessary or proper parties to this action. The defendant represents creditors. The person having the fund and the heirs-at-law are the only necessary parties. It is only necessary to make credit-

ors parties where the object is to carry out the assignment. (Wakeman *a.* Grover, 4 *Paige*, 23; Bank of British North America *a.* Suydam, 6 *How. Pr.*, 379.)

Leonard, J.—The surplus money arising on a sale of land under mortgage foreclosure stands in the place of the land in respect to those having liens or vested rights therein, and the widow of the owner of the equity of redemption is entitled to dower in the surplus, as she was in the land before the sale. This proposition is not disputed by the counsel for the defendant, but it is insisted that the right of the plaintiff to dower is barred by her neglect or omission to assert her claim in certain actions and proceedings involving the title to the land or its surplus proceeds, in which actions the plaintiff was a party.

The plaintiff was made a party defendant in the foreclosure actions, but she omitted to appear or assert her claim for dower. After the sale under the judgments of foreclosure, a reference was had by an order of the court in respect to the surplus money arising on the sale; but the plaintiff not having appeared in the actions, or filed any claim to the surplus, was not notified of the proceedings, and the whole fund was ordered to be paid to the defendant Duryee, on his claim as assignee in trust for the benefit of the creditors of the assignor Charles S. Mathews, the former owner of the equity of redemption, and the late husband of the plaintiff.

Prima facie this money is still in the hands of the defendant, and no evidence is offered to rebut that presumption. He holds the money as a trustee merely, without having parted with any actual consideration therefor, and is under an obligation to pay it to the party justly entitled thereto. His title to the money is of no higher degree than that of a creditor having a lien on the land by judgment before the foreclosure sale. The dower-right of the widow is paramount to either.

The defendant, Mr. Duryee, also brought an action for the settlement and closing of his trust as assignee, in which the plaintiff was made a party defendant, but she made no claim therein of her dower-right in the fund in question.

These actions and proceedings it is insisted constitute a bar to the present action in law and equity, by reason of the neglect or omission of the plaintiff to assert her claim therein, as,

it is insisted, she was required to do by the rules of law and the course of decisions in like cases.

Had there been any allegation in the complaint, in either of the actions referred to, affecting the dower-right of the plaintiff, the judgment in such action would undoubtedly have barred the plaintiff's claim. But that subject was not put at issue in those actions. The object of the first-mentioned actions was the foreclosure and sale of the mortgaged premises. As against the mortgages sought to be foreclosed, the plaintiff had no dower-right. She could not defeat the claim of the mortgagees by setting up her dower-right in those actions. The interposition of her rights as doweress would constitute a collateral inquiry only, to be considered as between the defendants in those actions who might claim the surplus money, in the contingency that any surplus should remain.

Nothing has been adjudged in any action or proceeding, except the one now before the court, relating in any manner to the claim of the plaintiff to dower in the land or in the surplus money in question.

There is no inconsistency between the order awarding the surplus money to the defendant Duryee, as assignee, and the judgment in this action, because the plaintiff was not before the referee in that proceeding, and her right was not passed upon. The defendant was adjudged to be entitled only as against those who were legally before the referee as parties, not as against the plaintiff, who was not before him.

The defendant has not been induced to take any action, nor has he parted with any thing, nor sustained any injury by reason of the neglect or omission of the plaintiff to assert her claim in any of the actions or in the proceedings referred to. He has simply obtained possession of the whole of a fund in which he is entitled to part only.

The present claim is not within the principles decided in, or is distinguishable from, the cases referred to by the learned counsel for the defendant, wherein the neglect or omission of a party to an action to assert a claim or right has been held to bar a subsequent action.

We hold, therefore, that the actions and proceedings relied on by the defendant do not amount to a bar or defence against the present action.

The facts are proven, from which a computation of the value of the plaintiff's estate or interest can be ascertained, upon the principles adopted by the rules of the court. The consent of the plaintiff to accept the sum found in her favor in lieu of dower, may be inferred from the judgment herein in her favor, from which she has not appealed.

The demand of the plaintiff "of her dower in the surplus fund," seems not to be objectionable. She demanded no more than she was entitled to. The defendant made no objection to the form or amount of her demand. He did not offer to set apart one-third of the fund in his hand, and to pay her the income of that portion, nor to admit her right to any extent in any form. It is true, that he could not be required to make her an offer; still, the demand informed him of the extent and nature of the plaintiff's claim, and it is adjudged that her claim is correct. The possession of the money by the defendant at the time of the demand, and the neglect or refusal of the defendant to admit and satisfy the plaintiff's claim, carries with it the right to interest.

The defendant also insists that the creditors of Charles S. Mathews should have been made parties to this action.

This objection is not well founded. The defendant has the legal title to the fund, and represents, in his capacity of assignee or trustee, all the creditors of the estate.

The judgment should be affirmed, with costs of the appeal from the assigned estate.

Clerke, J., concurred.

Sutherland, J.—I dissent. I think there is no precedent or principle for such an action as this. If the plaintiff has any remedy, it appears to me that it must be by a motion or proceeding to vacate or modify the orders under which the money was paid to the defendant Duryee.

Judgment affirmed, with costs, &c.*

* We are informed that an appeal to the Court of Appeals has been taken from this decision.

Reversed 19 abb. 1; 31 356.

MITCHELL *a.* MOUNT.

Supreme Court, First District; General Term, March, 1864.

JUDGMENT AGAINST EXECUTOR.—PRIORITY OF PAYMENT.—EXECUTION.—ACCOUNTING.

Under 2 Rev. Stat., 116, § 20,—authorizing the surrogate to require an accounting from an executor against whom judgment has been rendered, after a trial at law upon the merits, and, if assets properly applicable to the judgment are disclosed, to direct an execution to issue,—the surrogate has not power to order an execution, where the debts of the deceased exceed the assets, in such a case as to give a preference to a debt which is not by the statute entitled to such preference.

The surrogate has no power to order an execution to issue upon a judgment recovered against the executor for a debt of the deceased, unless it has been ascertained by an accounting what sum is properly applicable to the payment of the judgment; and then the execution can only be issued for the sum so applicable.

The recovery of judgment against an executor or administrator for a debt of the deceased, creates no preference. The fact that the suit was commenced against the deceased in his lifetime, does not alter the rule.

Appeal from an order of the surrogate of New York county.

This was an appeal taken by Richard E. Mount, Jr., executor of William B. Moffat, from an order allowing an execution against him upon a judgment recovered by John Mitchell and Abraham Cummings. The action was pending against Moffat, in the New York Common Pleas, at the time of his death. The action was continued against Mount as executor; and plaintiff, in July, 1863, had judgment for $1261.70, after a trial at law upon the merits. In September, 1863, the plaintiff filed a petition in the Surrogate's Court, setting forth the facts and asking leave to issue execution on the judgment. The surrogate cited the executor to show cause why execution should not issue. The executor appeared to oppose, and showed that he had received in money from the personal estate only $11,000; that there was other personal estate of which he could not take possession; that the debts of the deceased were $42,000; that the real estate of the deceased, valued at $500,000, was incum-

bered by mortgages and unpaid taxes to the extent of $350,000; that it could not be sold at its fair value on account of the pendency of suits affecting the title. He also averred his belief that at the expiration of eighteen months from the date of the letters testamentary he would be able to account, and to pay in full the debts of the deceased. The surrogate directed that the execution issue, and the executor appealed.

Gouverneur Tillotson, for the appellant.—I. The surrogate had no authority to issue the citation. The application was under 2 Rev. Stat., 116, § 19; the next section prescribes the form of the citation, which must be for an accounting (§ 20). The accounting is necessary to show: 1. Whether there are any assets applicable to the judgment; 2. The amount of such assets. The citation issued by the surrogate not being authorized by the statute was void *ab initio*, and all subsequent proceedings under it are void.

II. It appearing from the affidavit of the executor that the personal property was insufficient to pay the debts, the execution, even if authorized at all, should have issued only for the amount properly applicable to the judgment. The statute expressly prohibits the surrogate in such case from issuing execution for the full amount of the judgment.

William R. Stafford, for the respondents.

Clerke, J.—On appearing before the surrogate, on the order to show cause, the executor showed that he had only received from the personal estate $11,000, and that the personal debts amounted to $42,000. Notwithstanding this, the surrogate decided that the judgment should be forthwith paid, and accordingly ordered an execution against the executor for the full amount of the judgment.

The statute (3 *Rev. Stat.*, 5 ed., 204, § 21), authorizing the surrogate to order an execution to be issued in such cases, does not authorize him to order an execution in cases where the debts exceed the assets, unless it is a debt that has a preference. Otherwise, this section would completely nullify the previous provision contained in article 2 (3 *Rev. Stat.*, 5 ed., 174, § 31), which directs every executor and administrator to pay the

debts of the deceased, according to a specified order of classes: 1. Debts entitled to a preference under the laws of the United States; 2. Taxes assessed upon the estate of the deceased previous to his death; 3. Judgments docketed and decrees enrolled against the deceased, according to the priority thereof respectively; 4. All recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts.

The judgment recorded by the respondents gives them no priority. It was not recorded against the deceased during his lifetime, but against his executor. It is, therefore, to be regarded as belonging to the fourth class; and the statute expressly provides (3 *Rev. Stat.*, 5 ed., 174, § 32), that no preference shall be given in the payment of any debt over other debts of the same class, except those specified in the third class; nor "shall the commencement of a suit for the recovery of any debt, or the obtaining a judgment thereon against the executor or administrator, entitle such debt to any preference over others of the same class." Under our present system of administration of the estates of deceased persons, all judgments against their personal representatives come in only for equal dignity with recognizances, bonds, sealed instruments, and demands on simple contract. (See Parker *a.* Gainer, 17 *Wend.*, 559; Butler *a.* Hempstead, 18 *Ib.*, 666.)

It is quite clear, therefore, that the surrogate had no authority to order execution for the payment of this judgment; the most that he could do would be on the accounting by the executor, under the order to show cause, to order an execution for the sum that may have appeared on the settlement of the account to have been a just proportion of the assets applicable to the judgment. (3 *Rev. Stat.*, 5 ed., 174, § 36.) It does not appear from the case that any attempt at a settlement of the account has been made, so as to enable the surrogate to ascertain what that proportion may be. Indeed, he says nothing of a settlement of the account in the order appealed from; he merely says, that it appears there are sufficient assets in the hands of the executor. This is not sufficient to authorize the issuing of an execution against the executor for any amount. There must first be a settlement of the account, to ascertain the proper proportion. Whether this is practicable in any case before the final settlement, is questionable.

The order of the surrogate should be reversed, with costs of the appeal.

SUTHERLAND and LEONARD, JJ., concurred.

VALTON *a.* THE NATIONAL LOAN FUND LIFE ASSURANCE SOCIETY.

Supreme Court, Third District; General Term, Sept., 1863.

QUALIFICATIONS OF JURORS.—CHALLENGE.—HEARSAY.—RES GESTÆ.—PARTNERSHIP.—SUGGESTION OF MISTAKE BY WITNESS.—INSURANCE.—MISREPRESENTATION BY INSURED.

A juror, not a freeholder, nor assessed in respect to any personal estate, should be set aside, although it appears that he is worth in personal property, above all debts, two hundred and fifty dollars.

On an issue as to the terms and good faith of a partnership, the instructions given to the conveyancer who drew the partnership articles are admissible as a part of the *res gestæ.*

Where a judge, in charging the jury, informed them that they were to say whether a witness, who was not contradicted or impeached, was mistaken in his statements of a conversation which took place twelve years before,—*Held*, that such instruction was proper.

Misrepresentations as to the pecuniary condition of an applicant for a life insurance, made to the medical examiner selected by the insurers, do not invalidate the policy.

Where an applicant for a policy of life insurance untruly represented to the general agent of the insurance company, and also to its medical examiner, that he was a moneyed man, and the company in defending an action on the policy offered to show that the medical examiner would have recommended the rejection of the risk, if the truth had been disclosed to him,—*Held*, that the evidence was inadmissible.

Appeal from a judgment, and from an order denying a motion for a new trial, and for leave to amend answer.

This action was brought by Gerard Valton, and Amos Adams, the latter as assignee of Daniel Martin, against The National Loan Fund Life Assurance Society, to recover the sum of $10,000, and interest, upon a policy of insurance issued

by the defendants on the life of one Conrad Schumacher. Shortly after the issuing of the policy, the plaintiff Valton, with Daniel Martin and Schumacher, entered into partnership as liquor dealers, in Albany, agreeing that in case of Schumacher's death, during the partnership, unmarried, it should become the absolute property of Valton and Martin, to be divided equally between them, or the survivor, and the executors or administrators of the other, if either should happen to die. In such case, Valton and Martin, or the survivor of them, was authorized to collect the amount of the policy. Martin's interest had been transferred to the plaintiff Adams. On a previous trial a verdict and judgment for plaintiffs had been affirmed at general term (22 *Barb.*, 9), and the judgment subsequently reversed in the Court of Appeals and a new trial ordered. (20 *N. Y.*, 32.)

The second trial was before Mr. Justice Miller and a jury, in February, 1862.

A jury having been regularly drawn by the clerk, each party exercised their right of peremptory challenge, and the four jurors so challenged having been excluded from the panel, the plaintiff challenged, for principal cause, one John Denmee, who had been drawn as a juror for the trial. Denmee, being examined in respect to his qualifications as a juror, stated that he resided in the fourth ward of the city of Albany; that he owned no real estate, and had not been assessed in respect to personal estate. Said juror further stated, that he was worth the sum of $250 over and above his debts. The judge sustained the challenge, and set the juror aside. The defendants excepted.

William J. Hadley, counsellor-at-law, a witness in behalf of plaintiffs, testified, among other things, that in the early part of May, Martin, Valton, and Schumacher called at his office, in Albany, and directed him to prepare their articles of partnership; and in the course of the instructions, they stated what their business was; that Valton and Martin were to supply the capital; that Schumacher was skilled in mixing liquors, and in making Holland gin, and his services were to be put in as against their capital. All this testimony was separately objected to on the following grounds: 1. That it was declaration and hearsay. 2. That it was immaterial. 3. That the articles of copartnership were the only competent evidence of the

agreement. 4. That under the pleadings no partnership, prior to the 30th of May, can be proved. 5. That no partnership can be shown, if material, by the statements of parties to their attorney. The judge overruled the objections, and the defendants excepted.

The same witness also testified, that having prepared the articles of copartnership, in pursuance with the instructions, he left them with one of the parties for examination; that they kept the articles some time, and returned them to him, with instructions to make an addition to them; that they instructed him that Schumacher had effected a policy of insurance in defendants' company for $10,000, and that they wished it inserted in the articles that in case of his death, unmarried, his interest in the policy was to take the same direction as his interest in the business. Defendants objected to this testimony, on the same grounds stated in the last objection. The court overruled the objection, and admitted the testimony only as part of the *res gestæ*, and the defendants excepted.

Valton, one of the plaintiffs, called as a witness in behalf of himself and his co-plaintiff, testified that he became a partner with Martin & Schumacher, in April, 1850, and that the business commenced on the 1st or 2d of May, 1850; that about the middle of May, he and Valton and Schumacher talked about a policy of insurance; that Schumacher wanted to have his life insured, and had intended to commence a gin distillery in New York; that Valton and Martin should advance the money for him, because he expected money from his uncle in Germany, who he said was very rich; and if the money would not come, and the business would not succeed, he would insure his life, so Martin and Valton should not suffer any loss. The witness did not recollect how much they were to advance, but he thinks Schumacher said it would require much money; Schumacher was to have the distillery in New York; that he wanted to buy or rent a house; that machinery was to be put in the distillery. The witness did not recollect that any distillery had been hired, or machinery bought.

William Lacey, a witness called by the defendants, testified that in 1850 he was the agent at Albany for the defendant's insurance company; that in February or March of that year, Martin applied for a policy of insurance for $10,000 on the life

of his friend or partner, of the age of either 33 or 34 years. On the 14th of May he applied again to the witness, wanting to effect the insurance of which he had spoken; when the witness gave him the blanks, the proposal, and the certificate, to be signed by Dr. Staats, the medical examiner at Albany of the defendants. When Martin brought Schumacher to the agent's office, he was introduced by Martin to Lacey as the person whose life was to be insured. Lacey then said, Why, I suppose this man is your porter? Martin said, No; we are all Germans, working together in the store. Lacey replied by saying that he did not like to take his life for $10,000; that he did not like the look of the thing. Martin then said, He is the moneyed man of the concern, and it's all right. Lacey had previously seen Schumacher in a baize apron sweeping the street in front of the store. The witness further testified, that he believed the representation made to him that Schumacher was the moneyed man of the concern; that from what he had seen of Schumacher, he would not have acted upon the application to insure his life for $10,000, if Martin had not represented that he was the moneyed man of the concern; that he would not have recommended the risk, and would not have sent the papers to New York, unless accompanied by a recommendation to reject it. Dr. Barent P. Staats, called as a witness on behalf of the defendants, testified that he was their local physician in Albany, in 1850; that he recollected the application for the insurance on Schumacher's life. Referring to the certificate, he said it was the one given by him; that on the morning of its date Martin called on him to know at what time he could examine his partner Schumacher. Witness appointed one o'clock of that day, at which time Martin called with Schumacher upon witness. Witness stated, that as his pay was graduated by the amount of insurance, witness asked him how much he was going to insure for. Schumacher said it was $10,000. Witness replied to him, he must take off his coat or jacket, he must have a good indorser; it was a large amount, and he must have a good indorser for so large an amount. Witness said he meant thereby he must have a more thorough examination. Martin observed to witness, he must not judge from appearances; that Schumacher was the moneyed man of the concern. The witness testified that Schumacher was dressed

very common, and looked like a laboring man. The certificate of the medical examiner consisted in answers to nine questions, all of which he was requested to answer minutely.

The last and ninth one was, "Opinion on the life." ☞ "A decided opinion, recommending the acceptance or rejection, and of the proposal." To this latter question, Dr. Staats, the medical examiner, certified as follows:

"A good risk; I recommend acceptance." The witness further testified, that he was accustomed to give an opinion on the whole case; that opinion was required to be decided. The witness was then asked by defendants' counsel the three following questions: 1. "If it had not been for the representation that Schumacher was the moneyed man of the concern, would you, from your knowledge and observation of Schumacher, have recommended the acceptance of the proposal?" 2. "Did the representation in question produce "any, and if any, what effect on your mind?" 3. "Did the said representation have any influence, and if any, what, upon your subsequent action in making your certificate and report?" These questions on being put to the witness were severally objected to by plaintiffs' counsel, and excluded by the court, and defendants' counsel excepted.

Valton testified that Frederick Oltman was hired as a clerk and porter in the store of Valton, Martin & Co., at the rate of $30 per month and his board. Valton could not recollect whether he was hired when they opened the store, or a few weeks later. Oltman lived at Martin's house in Albany. Oltman was a German; he was a copyist in that country.

It appeared that Schumacher came to the Shakespeare Hotel in New York, and registered his name there on the morning of the 23 of August, 1850. He came without baggage. He asked the proprietor of the hotel the price of board per week, and upon being informed that it was $4 per week, he said he would pay in advance, as he had no baggage, and that he would fetch the money from his boss, Valton: at other times he called Valton "the old man." Oltman came to the same hotel on the morning of the 30th of August, 1850. Valton was then in New York. Valton stated that at about 10 o'clock on the morning of the 4th of September he saw Schumacher and Oltman in the City Hall Park, in New York. Schumacher and Oltman told

him they were going a-fishing, and that they went towards the North river. Oltman testified on a commission, that on the 4th of September, 1850, he was in a small boat in company with Schumacher, crossing the Hudson river to the city of New York, and that while crossing the river and opposite New York, Schumacher accidentally fell overboard and was drowned. Liévre, the proprietor of the Shakespeare Hotel, testified that Oltman came to the hotel about seven o'clock in the evening of the 4th of September, and said that Schumacher was drowned; that he took a drink as soon as he came in, and that he behaved so comfortable that it made bad feelings in the witness.

There was a considerable amount of testimony produced on both sides bearing upon the question, whether a body found on the 7th of September, 1850, floating on the North river, near Jersey City, was that of Schumacher or not. The chief proof on this point consisted in the testimony of Valton, who identified a neck-handkerchief and pair of pantaloons taken from the body as having been worn by Schumacher when he was last seen by Valton; and the testimony of his son-in-law Bussing, who also identified the neck-handkerchief. The corpse was so much disfigured that persons who had known Schumacher in his lifetime could not, with the exception of Valton, be positive as to the identity, though they expressed a belief that it was Schumacher's body.

At the conclusion of the testimony on both sides, the defendant's counsel moved to dismiss the complaint on the following grounds: 1. That it appears by evidence, which is uncontradicted, that the policy was taken out, or procured to be taken out, for the benefit of Valton and Martin. 2. That it appears by evidence, which is uncontradicted, that said policy was taken out under an agreement that the same, when taken out, should be assigned to Martin and Valton; that said policy was assigned pursuant to said agreement, and that it does not appear that Martin and Valton, or either of them, received or ever held said policy as security, or indemnity for any obligation or liability incurred by them. 3. That it does not appear that said policy of insurance was assigned to Martin and Valton upon any valid consideration whatever. 4. That it appears by evidence, which is uncontradicted, that said policy was taken

out as security for such sums of money as Martin and Valton might advance in the procuring and establishment of a distillery, and that it does not appear that Martin and Valton, or either of them, advanced any moneys or incurred any liabilities whatever, on the faith of said policy.

The motion was denied by the presiding judge as to each ground, and the defendant's counsel separately excepted as to the decision on each of said grounds.

At the close of the charge, the presiding judge was, among other things, requested to charge as follows: That there was no evidence in the case that the second instalment of premium on the policy was paid by Schumacher; and that the fact, if proved, that a letter was sent from Schumacher to Martin, stating that in it was inclosed the money for the payment of said second premium, is no evidence that the money was sent by Schumacher to Martin. The judge charged the jury that the fact that a letter was sent from Schumacher to Martin, stating that in it was inclosed the money for the second premium, was no evidence in itself that the money was sent from Schumacher to Martin, but declined to charge that there was no evidence in the case that the second instalment of premium on the policy was paid by Schumacher; and as there was evidence on this subject, submitted the question to the jury to determine how far the evidence established the fact of the payment of the second premium by Schumacher: to which part of the charge as given, and to declining to charge as requested, the counsel for the defendants then and there excepted. The counsel for the defendants then excepted to the judge's charging the jury that they were to say whether Lacey was mistaken, and whether, after the lapse of twelve years, he does not recollect the exact language used on that occasion. The counsel for the defendants then requested the judge to charge the jury, that when the witness Lacey made a positive statement, the jury was not at liberty to disregard it, unless he was contradicted or impeached. The presiding judge declined so to charge, but instructed the jury that it was purely a question for them to determine, in view of the facts stated by him and the other evidence in the case, whether, after the lapse of time, the witness Lacey had or had not correctly stated what Martin said as to Schumacher being the moneyed man of the concern; to

which part of the charge, and to the refusal of the judge to charge as requested, defendant's counsel excepted.

The jury rendered a verdict for the plaintiffs for $17,825.48. A case was thereupon made by the defendants, containing the evidence and exceptions: the same having been duly settled, judgment upon the verdict was perfected by the plaintiffs on the 2d of February, 1863.

It was thereupon stipulated between the attorneys for the respective parties that the defendants have leave to move for a new trial at special term, in the same manner as though judgment had not been entered.

The defendants accordingly made such motion at a special term of this court on the 2d of March, 1863; and they also, at the same time, upon affidavits, moved for leave, in case the motion for a new trial should be granted, to amend their answer by adding the following allegation at the end of the 7th paragraph of said answer:

"And upon information and belief, the defendants allege that the said Valton and Martin procured the said policy of insurance to be issued and assigned to them, and the same was so issued and assigned, as security for such sums of money as they might advance for the purpose of the business of a gin distillery, to be commenced by them and the said Schumacher, and to indemnify them against any losses in said business; that the said Valton and Martin advanced no moneys for the purposes of said business, nor did they sustain any loss therefrom."

The court, at special term, denied the motion for a new trial, and from the order denying said motion, and from the judgment, the defendants appealed to the general term of this court. Prior to the taking of this appeal, the plaintiff Amos Adams died, and his executor, John F. Batchelder, was, by an order of this court, substituted as co-plaintiff with Valton.

Lyman Tremain and *Henry Nicoll*, for the appellants.—I. The evidence at the trial established that the policy of insurance was not taken out for Schumacher's benefit, but under an agreement that the same should be held by Valton and Martin as security or indemnity for moneys to be advanced: the plaintiffs failing to show any moneys advanced or liabilities incurred, were not entitled to a recovery. 1. The agreement for a part-

nership was, in point of fact, prior to the issuing of the policy. Martin applied for the policy and paid the premium: the policy was delivered to him: Schumacher took no part beyond signing the proposals and submitting to examination. 2. The pretence of the plaintiffs, that the policy was taken out to protect Martin and Valton against the loss of Schumacher's services and skill in case of his death, is without reasonable foundation; their contingent title to the policy under the partnership agreement, is wholly inconsistent with the idea of their having taken it as security or indemnity for any such loss. 3. A policy of insurance effected on life is a wager contract, and unless issued for the security or indemnity of the party taking out the policy, is void by the Statute against betting and gaming. (1 *Rev. Laws*, 223, ch. 44, § 5; Bunn *a.* Riker, 4 *Johns.*, 426; Campbell *a.* Richardson, 10 *Ib.*, 406; 1 *Rev. Stat.*, 662, §§ 8, 9.) 4. Every person is presumed to have an interest in his own life, which he may insure; but such presumption does not exist in favor of a third person effecting an insurance, for his own benefit, on the life of another. In the latter case, there can be no recovery, unless an interest in the life insured be affirmatively shown. (Amory *a.* Gilman, 2 *Mass.*, 1; Rhind *a.* Wilkinson, 2 *Taunt.*, 237; Halford *a.* Kymer, 10 *Barn. & Cress.*, 724; Wainwright *a.* Bland, 1 *Mees. & Welsb.*, 32; S. C., 1 *Mood. & Rob.*, 481; Lucena *a.* Crawford, 2 *Bos. & Pul.*, 324; Stockdale *a.* Dunlap, 6 *Mees. & Welsb.*, 224; *Angell on Fire & Life Ins.*, §§ 68, 297, 298.) 5. There is no substantial difference between a policy of insurance taken out by one person on the life of another, and a policy issued to one individual on his own life, and assigned by him to a third person, under an agreement to do so made prior to the issuing of the policy. In either case, the assignee is virtually the party insured, who can only recover upon proof of an interest in the life insured. (Wainwright *a.* Bland, 1 *Mood. & Rob.*, 481.)

II. The testimony of the witness Hadley, that when Martin, Valton, and Schumacher called to have him draw up the articles of copartnership, it was mentioned that Schumacher was a person skilled in mixing liquors and in making Holland gin, was improperly admitted as evidence. (1 *Greenl. Ev.*, §§ 108, 109, 114; Enos *a.* Tuttle, 3 *Conn.*, 247; 1 *Cow. & Hill's Notes*, 585; Land *a.* Tyngsborough, 9 *Cush.*, 36; Luby *a.* Hudson R.

R. Co., 17 *N. Y.*, 131; Moore *a.* Meacham, 10 *N. Y.* (6 *Seld.*), 207.)

III. The letter purporting to be written by Schumacher to Martin, and bearing date at New York on the 21st of August, 1850, was improperly admitted in evidence. (Utica Ins. Co. *a.* Badger, 3 *Wend.*, 102.)

IV. Martin represented to Lacey, the agent of the Company, that Schumacher was the moneyed man of the concern of Valton, Martin & Co.; this was expressly stated at the time of and as a part of the application for the insurance; the representation was made with the purpose of removing an unfavorable impression created by the personal appearance of Schumacher, whose dress and look denoted him to be a laboring man, and whom Lacey supposed to be a porter in the store. The jury, by their verdict in favor of the plaintiffs, must have found, as matter of fact, either, 1. That the representation was not made; 2. That if made, it was true; or, 3. That although made, and although false, it had no material effect on the judgment of Lacey, in influencing his action upon the application for the policy. There is no evidence in the case upon which any one of these propositions could be found.

V. The judge refused to permit the defendants to show, by Dr. Staats, whether, from his knowledge and observation of Schumacher, he would have recommended the acceptance of the proposal if the representation had not been made; whether the representation produced any effect on the mind of the witness; and whether it had any influence upon his subsequent action in making his certificate and report. The relevancy and materiality of this inquiry seem obvious; by reason of its exclusion, the jury were deprived of testimony most important in its bearing upon a point expressly submitted to them by the presiding judge: the exceptions, therefore, of the defendants, in this respect, were well taken.

VI. John Dennee, drawn in the panel of jurors, was duly qualified by law to sit as a juror in the case, and the presiding judge erred in sustaining the plaintiff's challenge to him for principal cause. (2 *Rev. Stat.*, 411, 415.) No right of challenge for principal cause *propter defectum* is given by the Revised Statutes. It manifestly was not the intention of the Legislature to permit a party to object to a juror on grounds

upon which the court itself is not authorized to discharge him. If the right of challenge now exists at all, it can only be to the extent allowed under the former law—that is, not that the juror challenged has not been assessed in the required amount, but that he was not, in fact, at the time of the challenge worth it.

Clark B. Cochrane and *John K. Porter*, for the respondents.—I. The verdict was clearly in accordance with the evidence upon each of the questions litigated at the trial. 1. The fact of Schumacher's death was established beyond all controversy, and was proved to the satisfaction of the jury. 2. The pretence that Schumacher did not pay the premium, is not only unsustained, but affirmatively disproved. 3. The pretence that the assured misrepresented his vocation, is utterly unsupported by the evidence. 4. The pretence of fraudulent oral misrepresentations by Schumacher to Lacey, is wholly unfounded. 5. The strange defence that Schumacher, "with or without his concurrence," had been secretly kidnapped or murdered for the benefit of the partners, is surely not one to be credited, without some affirmative evidence of its truth. 6. The theory of the defendants, that Schumacher entered into a conspiracy with Martin and Valton to get his life insured by false pretences, and then be murdered for their benefit, is not so probable that a second verdict of a jury should be condemned for questioning it.

II. All the questions of fact in the case were fully and fairly submitted to the jury, under a charge to which no valid exceptions were taken on either side; and a verdict upon those questions is conclusive. (Cohen *a.* Dupont, 1 *Sandf.*, 260; Fleming *a.* Hollenback, 7 *Barb.*, 271, 275; Douglass *a.* Tousey, 2 *Wend.*, 352; Borst *a.* Spelman, 4 *N. Y.* (4 *Comst.*), 284; Hart *a.* Rensselaer & Saratoga R. R. Co., 8 *N. Y.* (4 *Seld.*), 37, 43.)

III. The challenge to the juror, John Denmee, was properly sustained by the court. (2 *Rev. Stat.*, 411, 415, 508; Boyd *a.* State, 1 *Howard* (*Miss.*), 163; 2 *Cow. Tr.*, 2 ed., 881, 888; 2 *Laws of* 1847, 734, ch. 495, § 1.) Even if it had been otherwise, the allowance of the challenge would, in this case, have furnished no ground for a reversal of the judgment.

IV. There was no error in the decisions of the court, on any of the questions presented as to the admission and exclusion of

evidence. 1. The several objections to the proof that Mr. Hadley drew the articles of copartnership by the instruction of the parties, were properly overruled. (Valton *a.* National, &c., Ins. Co., 22 *Barb.*, 9.) The admission of the evidence became wholly immaterial, as the fact of actual partnership, previous to the application, was afterwards established by independent and explicit proof. 2. The question put to the witness Valton, "When did you, and Martin, and Schumacher become partners?" was properly allowed. 3. The answer of the witness Lacey to the inquiry proposed to him, as to his course of business and practice, in a case where his opinion was adverse, was properly excluded by the court. 4. The court also properly excluded the question put to the medical examiner, Dr. Staats, "Is your opinion confined to matters of health, or the whole case?" The witness had already testified that he had nothing to do with the applicant for insurance, except to examine his person. That his business was merely to examine and report as to the physical condition of his body, and that he had not to report any thing to the company but what his certificate contained, and that related exclusively to the person of the applicant. He further testified, that he had no instructions or authority from the company except what is contained in the papers to which the certificate with his name was attached. The examination required to be made by him was no other than that of a medical examiner. 5. Other questions proposed to Dr. Staats were also properly excluded by the court. 6. The letter from Schumacher of the 21st of August, remitting the second premium to Martin, was properly received in evidence. (Valton *a.* National, &c., Ins. Co., 22 *Barb.*, 9.)

V. The defendant's contract of insurance was with Schumacher. He obtained the policy for his own benefit, and had the right to dispose of it as he saw fit. No consideration was necessary to sustain the validity of the agreement. (Valton *a.* National, &c., Ins. Co., 22 *Barb.*, 9; Same *a.* Same, 20 *N. Y.*, 32.) It was at most a question of fact for the jury to determine from the whole evidence, whether the policy was taken out as security for such sums of money as Valton and Martin might advance, in procuring and establishing a distillery. The jury were fully and properly instructed upon all these questions, and have found against each proposition.

VI. There was no error committed by the court, either in giving or refusing instructions to the jury. There was evidence tending to show that Schumacher was a liquor merchant in Germany. In summing up the cause, the plaintiff's counsel had claimed that this evidence was sufficient to authorize the jury to find the fact that Schumacher had been in the wine and liquor business at Bremen. The twenty-one propositions submitted by the defendant's counsel, were presented at the close of the judge's charge, were most of them simply requests, designed to weaken the effect of the charge, by procuring the court to say, substantially, the same thing, in language less clear, pertinent, and appropriate. (Lyon *a.* Marshall, 11 *Barb.*, 241; Sherman *a.* Wakeman, *Ib.*, 254; Armstrong *a.* Tuffts, 6 *Ib.*, 432; Aeby *a.* Rapelye, 1 *Hill*, 9.) Even if the insurance had been obtained after an agreement by Schumacher to give Martin and Valton the contingent benefit of it, in the manner provided in their articles of copartnership, this would not have made the policy void. (Valton *a.* National, &c., Ins. Co., 22 *Barb.*, 9; Same *a.* Same, 20 *N. Y.*, 32; 1 *Phill. on Ins.*, § 358, 3 ed.; Lord *a.* Dall, 12 *Mass.*, 115; Trenton, &c., *a.* Johnson, 4 *Zabrisk.*, 576; Dalvy *a.* India, &c., 80 *Eng. Com. Law R.*, 364; St. John *a.* American Mutual Life Ins. Co., 13 *N. Y.* (3 *Kern.*), 31; American Life, &c., *a.* Robertstraw, 26 *Penn. R.*, 189.) The judgment should be affirmed. No error was committed by the court. The facts were fairly and fully submitted to the jury, and the plaintiffs ought not to be deprived of the benefit of the second verdict in their favor.

By the Court.—Miller, J.—The trial of this cause at the circuit occupied considerable time, and during its progress many intricate questions were raised and decided. Some of these questions related to the admission and rejection of evidence offered upon the trial. It is the opinion of one of the members of this court, that an error was committed by the justice who tried the cause, in refusing to allow certain questions to be put to the witness Barent P. Staats, the medical examiner of the company at Albany, upon an examination of the applicant prior to the taking of the risk. In that opinion I cannot concur, and propose briefly to examine the questions

arising, for the purpose of ascertaining whether any error was committed by the judge in this respect.

The witness was examined on the trial in reference to the circumstances attending the medical examination of Schumacher. On his direct examination, he testified generally to his appearance, size, &c.; and also, that when Schumacher said the amount was $10,000, he replied that he must take off his coat and jacket, and must have a good indorser; it was a large amount, and he must have a good indorser for so large an amount. That he meant he must have a more thorough examination. That Martin then observed that he must not judge from appearances, that Schumacher was the moneyed man of the concern. The witness then proceeded with a more thorough examination. Upon his cross-examination, he swore that his only business was to examine his person, and to examine and report as to the physical condition of his body. Upon being asked if that was all he did, and if he made any other report, he answered, "That was all I did. I did not make any other report. I reported nothing to the company but what the certificate contains. That related exclusively to the person. The thoroughness of my examination does not depend upon the amount insured." He also stated that his fees did not depend upon the amount insured.

It will be perceived that the examination made by the medical examiner was confined entirely to matters relating to the physical condition and the health of the insured. Such is the testimony of the witness as to the line of duty required at his hands, and such would appear to be the natural and necessary scope of an examination of such a character. It would be entirely inconsistent with the apparent duty of a physician required to examine and report as to the physical condition of a person, to include in his examination matters which properly belonged to another department. This duty would more appropriately be assigned to the general agent of the company, who conducted its general business, and who would be supposed to take charge of all matters pertaining to the risk.

Independent of the positive evidence of the medical examiner, that his business was merely to examine and report exclusively as to the physical condition of the person; the report that he made was entirely confined to this. The interrogato-

ries propounded, as will be seen, related entirely to the physical condition. The opinion required, was an "opinion on the life," evidently showing that it was the design and intention of the company to confine him entirely to the specific duty of medical examiner.

It is claimed that a decided opinion, recommending the acceptance or rejection of the proposal, embraced every thing which related to the physical or the pecuniary condition of the applicant. It strikes me that this view of the question cannot be upheld. The decided opinion required, was limited to an opinion based upon the interrogatories previously propounded, and in accordance with the last interrogatory but one, "an opinion on the life." If it were otherwise, the medical examination would include a range of inquiry more appropriately belonging to another sphere. It would actually embrace that of the general agent and the company itself, whose business it was to look after the general interests of the corporation, and the general characteristics of the risk. It would be absurd to say that a physician, assigned by an insurance company to examine as to the physical condition and health of an applicant for a policy of insurance, was required to look after every possible aspect of the case, and to be governed and controlled by his or her pecuniary circumstances, in forming his opinion "on the life." I think the doctrine contended for is irrational and cannot be sustained.

Upon the redirect examination of the witness by the defendants, he further stated that he always took a memorandum of the amount, to settle his accounts with the company, and to graduate the amount of his fees. Upon being asked, when Martin said Schumacher was the moneyed man of the concern, Did you believe it? he replied: "I thought it must be a very small moneyed concern, if he was the principal of it." The question was then put to the witness, whether, if it had not been for that representation, he would have recommended the acceptance of the proposal. The witness had already sworn that he thought it must be a small moneyed concern, if he was the principal of it, and notwithstanding this, he had recommended the risk; and the question put tended somewhat to contradict his evidence in reference to the opinion he had expressed as to the representation and his written recommendation of the risk.

In this respect, it may be questionable if it was admissible. I think, however, that it was incompetent on other and stronger grounds. It called for the opinion of the witness upon a point upon which he was not required or authorized, within the legitimate performance of his duties, to express an opinion. He was the medical examiner of the company. What had he to do with the question, whether this man was the moneyed man of the concern? No such inquiry was propounded to him. No such fact was within the scope of his authority. It was the physical, not the pecuniary condition of the insured that he was to examine. He was required to express an opinion on his life, not his property. He had already given an opinion as to that, from the examination made of his person. With this evidence introduced, it cannot fairly be claimed that he was required to go further and qualify it, by basing that opinion upon a matter that could have no connection whatever with his duties and responsibilities.

It is said that he was as competent to show the effect of such representations, as are the vendors of goods to show that they were induced by false representations to sell them, and as insolvents are to negate an intent to defraud their creditors in making a general assignment.

The cases are not analogous. Where a person sells goods to a fraudulent debtor, the whole transaction is presented. The fraudulent representations are the grounds upon which a recovery is sought. These are the inducement for the sale, and the effect they produced upon the mind of the vendor is material, important, and controlling. So in regard to an insolvent. This intent to defraud is the very essence of the matter in controversy. In the case of a medical examiner, the pecuniary condition of the applicant can have but little, if any thing, to do with his physical state. It is not properly before him. He is confined and restricted to a mere medical examination. Upon this his opinion is to be based. It is not within the scope of his power to express an opinion upon any other point, and he is disqualified from so doing by all the rules of law applicable to such cases. In order to require an opinion of a witness upon any subject, it must be made to appear that the subject-matter was one upon which he might properly be called upon to form an opinion, which would govern his action. In

the present case, the interrogatories which were presented to the witness clearly showed that the inquiry was not properly before him, as it was in the case referred to. By these interrogatories, he was restricted to the physical condition of the party. Besides the infallible testimony of the interrogatories themselves, the witness positively swears that such was the case. Can he be called upon to contradict the interrogatories and his own evidence, and to express an opinion whether he would have recommended the acceptance of the proposal, but for a representation that he was the moneyed man of the concern? I think not; and the question was properly excluded.

The second question, whether the representation had any, and if any, what effect upon the mind of the witness, is liable to the same objection, and the remarks already made are applicable.

The third question, whether the representation had any, and if any, what influence upon the subsequent action of the witness in making his certificate and report, is equally objectionable, and comes within the same category.

The two last questions were objected to upon the additional ground that they were cumulative. There may be some doubt whether the witness had not already sufficiently answered these questions, and virtually expressed his opinion as to the effect of the representation that Schumacher was the moneyed man of the concern, by signing the certificate, and by testifying that it was a very small moneyed concern, if he was the principal of it; in fact, whether he had not fully and completely negatived the idea that it had produced any effect and influence upon his mind, in recommending the risk, and in making his certificate and report. I am inclined to think that he had, and the defendant had, really, the whole benefit, by his answer to the question first put, which could be derived from an answer to all of the questions which were excluded on the trial. I am also of the opinion, that the questions were properly overruled for the reasons already given, and that this was not a case where the defendant was entitled to the opinion of the witness.

It is claimed that the question here presented is covered by the decision of the Court of Appeals, when this case was before them. (20 *N. Y.*, 32.) The court there held that a policy of insurance is avoided by a fraudulent representation in respect

to a fact not material to the risk, if, in the judgment of the insurer, it be material in respect to the inducements to undertake the risk. The question, in the Court of Appeals, arose upon an exception to the charge of the judge, and not upon a question as to the admissibility of evidence. There is a marked distinction, in my judgment, between a fraudulent representation made to an insurer and a statement made to a medical examiner, whose duties are expressly confined to an examination of the physical condition of the applicant. I have already discussed somewhat the difference between the two cases, and perhaps it is needless to say more. It may not be amiss to observe, that while the insurer, who is represented by the general agent of the company, has a general jurisdiction and control over the whole matter, the duties of the medical examiner are more specific, more narrow and circumscribed. The latter is a subordinate officer, acting under the general direction of the company or its general agent. I think that it cannot be fairly claimed that it was within the province of the medical examiner to pass upon the question whether the applicant was the moneyed man of the concern. He was not called upon to decide any such question. And such a representation would not properly have exercised any influence whatever upon his judgment, unless he assumed far greater power than was conferred upon him.

On the other hand, the general agent is the representative of the company. He receives the application, examines into the whole case connected with the issuing of the policy, receives the premium, and delivers the policy. He is, in fact, the insurer. And any representation made to him, if it influences his mind, is material and important. There is a broad distinction between the two cases. And while there appears to be no propriety in asking the opinion of the medical examiner as to the pecuniary circumstances of the person examined, there is an eminent appropriateness, a peculiar fitness, in ascertaining whether the judgment of the general agent was influenced by any such representations.

It is also said that the judge, at the circuit, upon the request of the defendant's counsel, charged that if the medical examiner of the company was induced by the false representation that Schumacher was the moneyed man of the concern, to rec-

ommend the acceptance of the application, and such recommendation had a material influence with the company in inducing them to issue the policy, then the policy was void, and the plaintiffs could not recover. Considerable stress is laid upon this portion of the charge, to sustain the position that the questions were proper. I incline to the opinion that the charge may have been correct, in reference to the testimony already given. It must be borne in mind that the witness had already testified that he thought that it must be a small moneyed concern, if he was the principal of it; and hence it may not have been improper for the judge to have charged as he did in reference to the testimony presented, with this expression of the opinion of the witness, and his action showing that the representation could have no influence upon his judgment under the circumstances, and with the charge of the judge pointedly upon the question.

Can it be urged with any force that the exclusion of the evidence had any weight upon the decision of the jury? I deem it unnecessary to pursue the inquiry further, preferring to dispose of the question upon other, and what I deem more substantial grounds.

It will be remembered that the judge was called upon to charge upon over twenty distinct propositions by the defendants' counsel. He charged upon most of these in favor of the defendants. Conceding that in the one referred to he made a mistake, it cannot be regarded a ground of complaint. The plaintiff may have excepted for this reason, but no argument in favor of the defendants' position that the evidence was proper, can be drawn from the fact that the judge charged in conformity with it. It only shows that the judge charged more favorably for the defendants than was warranted, as he clearly did, if the charge covered the questions overruled. And it has been repeatedly held by frequent decisions of this general term that this is no ground of error.

Even if it shows the judge was inconsistent, which I am not prepared to admit (and this is the utmost which can be claimed for the charge in this particular, so far as it bears upon the question now discussed), yet it is no ground for urging that he erred in rejecting the evidence.

A judge is frequently called upon, at the close of an impor-

ant and lengthy trial, to charge upon numerous propositions involving intricate and important questions, which he must necessarily dispose of without much examination, and with little deliberation. In my judgment, it should be his aim and object, so far as practicable, to divest the case of difficult and troublesome questions: while he guards the rights of all parties in his charge, he should be careful to injure none by refusing to charge upon propositions made to him by learned counsel. If his charge is more favorable than is demanded, it cannot be regarded by the party who has the benefit of it as an argument in favor of a new trial upon another point of the very same character, and embracing the same principle taken by him upon the trial in another stage of the case. It is at most an error which the party who excepts to it alone can complain of. As I have already shown, the charge as made may have been pertinent as the case stood: if it was not, the defendants have not lost any rights, and their grounds for a new trial must not rest upon the fact that the judge charged as they claim was right upon one proposition, even although he may have committed an error in deciding differently upon another ruling. The defendants must stand or fall upon the correctness of the ruling of the judge upon the admissibility of the evidence rejected; and I think the judge properly excluded the questions put to the witness.

I have confined my remarks to a discussion of the question presented in the opinion of the learned judge; but upon an examination of the other questions involved, I am satisfied that no error was committed on the trial. In a case of this magnitude, which has been twice tried at great length, and at large expense, while the forms of law should be duly observed, while the rights of all parties should be carefully and sacredly guarded, while we should rigidly scrutinize the proceedings of the trial to see that no error was committed, even if it is purely technical, and that no injustice has been done, a new trial should not be granted unless some plain legal rule or principle has been violated. I cannot see that such has been the case. I am therefore constrained to differ from the opinion of the learned judge in favor of granting a new trial.

A new trial should be denied, and judgment affirmed with costs.

Gould, J.—The sole point discussed in the two opinions before me relates to the rejection of the testimony (offered by the defendants) of Dr. Staats, as to his being influenced by fraudulent representations to recommend the risk to the company.

No doubt the charge, given at the request of the defendants, did say that if the medical examiner of the company was influenced by the false representations that Schumacher was the moneyed man of the concern, to recommend the acceptance of the risk, and that recommendation had a material influence on the company in inducing it to issue the policy, the policy was void, and the plaintiff could not recover. But the judge's seeing fit to gratify the defendant by stating such a point, cannot make relevant testimony not otherwise relevant. And, from a careful examination of the case, it would seem that the excluded testimony, as well as that admitted, as to Dr. Staats being influenced by the false representations, could, in no view, be relevant.

The last question of those addressed to him by the company's circular was, of necessity, but a summing up of the prior questions, equivalent to asking, "Since you have, in detail, stated the particulars as to the applicant's health, will you state, in conclusion, whether on the whole his health is such that you consider the risk a desirable one; and would you, as to that ground, recommend its being taken?"

This question is to be considered as applied to the subject-matter before him. And the company must have understood it, as this court would understand it, precisely as it purports. And, taken in that sense, it is merely impossible that the element of his pecuniary condition, instead of his sanitary, could have influenced the answer. The doctor would hardly say that his being a moneyed man would alter the number of pulsations, the liability to coughs, or the likelihood of living long. And as it could not alter any of the prior answers, how could it affect the concluding inference?

To have the answer influence the company, it was necessary that it be an answer to the company's question; and we are to view it in the light in which the company would, from the paper, understand it. And there is in the case no shadow of proof as to any effect it had on the company.

In that view, I see no error in the ruling. And whether I

should have found the verdict or not, I hardly deem this ground sufficient to order a new trial.

Hogeboom, J.—When this case was before the Court of Appeals, it was held that a policy of insurance is avoided by a fraudulent representation in respect to a fact not material to the risk, if in the judgment of the insurer it be material in respect to his inducements to undertake the risk. The particular request which the defendants' counsel made to the judge at the circuit, in the trial then reviewed, was, that if it was untruly represented by Schumacher, or in his behalf, to the agent of the defendants, that Schumacher was the moneyed man of the concern, and that the defendants would not have issued the policy without this, then the policy was void. The judge refused so to charge, and the Court of Appeals granted a new trial for that and kindred errors. The general principle established was, that fraudulent representations made to the insurer, though not material to the risk, yet material in the judgment of the insurer, and inducing the risk, will avoid the policy. The court made no distinction in this case between representations made to the defendants, or their directors or officers in New York and their agent at Albany.

The judge at the present trial charged in accordance with this doctrine. He went further, and in conformity with the request of the defendants' counsel, charged that if the agent, but for the false representation made by or in behalf of Schumacher, that he was the moneyed man of the concern, would not have acted further on the representation (that is, not have recommended to his principals the issuing of the policy), then the policy was void. It appears to have been assumed that if the agent had recommended the rejection of the application, it would have been rejected by his principals.

In another part of the charge the judge held, and I think properly, within the scope of the decision of the Court of Appeals, that if the defendants were induced to issue the policy by the false representation made to their agent, that Schumacher was the moneyed man of the concern, it was void. Mr. Lacey, the agent, had stated in substance, that but for the representation that Schumacher was the moneyed man of the concern he would have recommended the rejection of the application.

The judge at the circuit, upon the request of defendants' counsel, went further still, and charged that if the medical examiner of the company was induced by the false representations that Schumacher was the moneyed man of the concern to recommend the acceptance of the application, and such recommendation had a material influence with the company in inducing them to issue the policy, then the policy was void, and the plaintiff could not recover.

I think this charge also was within the spirit of the rule laid down by the Court of Appeals. The medical examiner must be regarded as much, and in as important a sense, the agent of the company as the local agent at Albany, Mr. Lacey. And his recommendation of the acceptance of the risk must be deemed likely to have had a material and controlling influence with the company in inducing the acceptance of the application.

All testimony, therefore, properly tending to show that the representation of the pecuniary responsibility of the applicant had an influence upon the medical examiner in inducing his recommendation of the acceptance of the application, was admissible.

There was testimony in the case tending to show that representations of that character were made to Doctor Staats. There was also testimony to show that these representations were false.

The effect which these representations had upon the mind and the action of Doctor Staats was sought to be ascertained, on the part of defendant, by three questions put to him, all of which were overruled, and I think improperly. The first was, whether he would have recommended the acceptance of the proposal but for this representation?

The object, of course, was to show he would not, and the question was material. He was competent to show the effect of such representation upon his action; as are vendors of goods to show they were induced by false representations to sell them; and as are insolvents who make a general assignment, to negate an intent to defraud their creditors in making the assignment.

The second question was, Did the representation produce any, and if any, what effect upon your mind?

This question was equally admissible; and although it was not as comprehensive as the first, it tended in the same direc-

tion, and was perhaps designed to remove any doubt as to its being leading.

The third question was, whether the representation had any, and what influence upon his subsequent action in making his certificate and report.

This question was, I think, of the same character, and directly tended to favor facts material to the case, and material to the view which the judge subsequently took of it in his charge to the jury.

Similar evidence to that here excluded was admitted from the witness Lacey. I do not perceive any solid distinction between the two cases, nor why, in law, the recommendation of the general business agent of that locality should be regarded as of any more competency than that of the medical agent.

If my brethren agree with me in this view of the case, it is not indispensable to examine any of the other questions which arose on the trial; and as some of them are of some difficulty and complexity, I prefer not to embarrass a future trial with the discussion and decision of doubtful points.

With regard to the defendant's application to amend his answer, and as that failed to be acted on by reason of the denial of the motion for a new trial, I think the more appropriate disposition of it belongs to the special term, where the plaintiffs can be heard in opposition to the application.

My opinion is, that the judgment should be reversed and a new trial granted, with costs, to abide the event, and without prejudice to a renewal of the application by defendants at special term to amend their answer.

Judgment affirmed.

REIMERS *a.* RIDNER.

New York Superior Court; General Term, January, 1864.

SALE OF CHATTELS.—QUANTITY.—GOODS AT SEA.—CONSTRUCTION OF CONTRACT.

Under a contract for the purchase of goods, where the right of property is not passed by the contract, the buyer is not bound to accept the articles when tendered, unless they correspond in quantity with what was bargained for.

The purchaser of goods at sea, of the quantity of which he cannot be presumed to be aware, is not bound to accept part of the quantity bought, any more than if the goods were in a distant warehouse.

Where, under a contract as follows, "Sold to R. 733 bags saltpetre to arrive on board ship A.," the seller tendered 393 bags, about half the saltpetre on board having been destroyed by the sea, it appearing, however, that the ship A. arrived with 786 bags on board,—*Held*, that the purchaser was not bound to receive the quantity tendered.

Exceptions heard at the general term in the first instance.

This action was brought by Theodore Reimers and Gotlieb Schmidt against John P. Ridner, Edward Thiel and Hugo Wachschlager, to recover $4235.36 damages for defendants' failure to accept and pay for three hundred and ninety-three bags of saltpetre under the following contract:

NEW YORK, September 25, 1855.

Sold to Messrs. Ridner, Thiel & Co., for account of Messrs. Reimers & Schmidt, seven hundred and thirty-three bags crude saltpetre, at 15 cents per lb. cash, in bond, to arrive on board the ship *Arabella* from Calcutta, bound to Boston. No guarantee made as to quality, or time of arrival of said ship: to be taken when landed alongside of the ship in Boston.

Signed,) BABCOCK & COX, Brokers.

The main facts being undisputed, a verdict was ordered for the plaintiff, defendants' exceptions to be heard at general term in the first instance. It appeared at the trial that an invoice of 1,467 bags of saltpetre was shipped on board the ship Arabella; that this shipment belonged to W. S. Bullard, and was the only

saltpetre on board of that vessel; that on the 11th of August, 1855, for account of the said W. S. Bullard, Esq., a broker in Boston "sold to the Hazard Powder Company one-half of an invoice of saltpetre to arrive per ship Arabella from Calcutta, say about 783 bags more or less (inv., 1,468 bags), at 8 cents per pound, 6 months' credit from delivery on the wharf. No guarantee as to quality or time of arrival." It further appeared that on the 12th of September, 1855, a contract, of which the following is a copy, was duly made by a broker and confirmed by said Bullard:

BOSTON, September 12, '55.

Sold on account W. S. Bullard, Esq., one-half of 1,464 bags saltpetre on board the ship Arabella, to arrive, at ten and one-half cents per pound cash, in bond (it being understood that the purchaser is to have one-half of such number in the invoice), to Messrs. Reimer & Schmidt, of New York.

(Signed) F. H. JACKSON, Broker.

(Confirmed) W. S. BULLARD.

It was admitted that 340 bags of saltpetre, to arrive in the Arabella, referred to in the complaint, were nearly or quite lost or destroyed, and were sold upon their arrival on account of the underwriters (part of the same being entirely dissolved by sea-water): that the same were abandoned by the *original importer* (Bullard).

The Arabella arrived on the 7th December, commenced discharging the saltpetre about the 15th, and finished on the 24th; the one-half of the invoice sold to the plaintiffs was sold to arrive in bond. It was entered in Mr. Bullard's name: it must be entered by the importer. Mr. Bullard held the bills of lading for this saltpetre; he had not assigned the bill of lading, or any part thereof, to Reimers & Schmidt (plaintiffs). A certificate of transfer, issued by the custom-house authorities, constituted a delivery of goods in bond, from the importer to the purchaser. Mr. Bullard did obtain such a certificate of transfer of these 393 bags sold to the plaintiffs; he obtained this certificate on the 7th of January, 1856; it was mailed the same day to the plaintiffs; the plaintiffs or their assigns could not have obtained the 393 bags of saltpetre without this certificate of transfer. The plaintiffs paid for the saltpetre between the 22d of December, 1855, and the 2d of January, 1856. The plain-

tiffs could not deliver the saltpetre they purchased from Mr. Bullard until the 7th of January, 1856.

The plaintiffs, on the 12th of January, 1856, made a formal tender, through their attorney at law, to the defendants, and they replied, "We cannot accept it (393 bags of saltpetre), as the contract calls for different things," or words to that effect.

Reuben W. Van Pelt, for the plaintiffs.—Delivery of the saltpetre according to the exact terms and in the exact mode stated in the agreement was not necessary. A substantial performance was sufficient, provided no injury or inconvenience was occasioned thereby, and provided also that the exact mode of performance be not an essential consideration. (*Story on Sales*, § 251.) The fact that the number of bags contracted to be sold was stated in the contract at 733, and the quantity actually delivered or tendered was 393 bags, does not excuse the defendants from taking the latter quantity, because the contract was by its very terms severable. The consideration was capable of apportionment, and the exact quantity was not of the essence of the contract. The defendants were, therefore, bound to carry out the contract, and take as many pounds at 15 cts. per lb. as the plaintiffs could deliver. (*Story on Sales*, §§ 240–242; *on Cont.*, § 16.) The defendants having unreasonably refused to accept the saltpetre, the title to which had been properly passed to them, the plaintiffs had the right, and it was their duty, after allowing a reasonable time to elapse, to sell it at auction, and hold the defendants responsible for the difference between the original price and the net sum which it brought. (*Story on Sales*, § 402.) The plaintiffs are entitled to judgment on the verdict.

James Eschwege, for the defendants.—I. The complaint does not state facts sufficient to constitute a cause of action, and should be dismissed on that ground. The complaint shows affirmatively that the plaintiffs were not ready to perform, and that they did not and could not tender performance of the contract on their part. Neither party can recover, unless readiness and willingness to perform on his part, and tender, are alleged. (Dunham *a.* Pettee, 8 *N. Y.* (4 *Seld.*), 508; Lester *a.* Jewett, 11 *N. Y.* (1 *Kern.*), 453; 12 *Barb.*, 502; Williams *a.*

Healey, 3 *Den.*, 363; West *a.* Newton, 1 *Duer*, 277.) The contract is entire, and the defendants are not bound to receive a part of the whole quantity only. (Russell *a.* Nicoll, 3 *Wend*, 112; Davenport *a.* Wheeler, 7 *Cow.*, 231; Champlin *a.* Rowley, 18 *Wend.*, 187; Waddington *a.* Oliver, 5 *Bos. & Pul.*, 61; Paige *a.* Ott, 5 *Den.*, 406; 2 *Pars. on Cont.*, 163, 170; Oakley *a.* Morton, 11 *N. Y.* (1 *Kern.*), 25.) The contract required the plaintiffs to deliver the saltpetre from alongside the vessel; the complaint does not allege readiness and willingness so to deliver, but the reverse: the plaintiffs aver that by the laws and statutes, rules and regulations, &c., they were prevented from delivering from alongside the vessel. The defendants were entitled to such delivery, which not having been tendered by the plaintiffs, they cannot recover. The complaint is bad for not alleging such tender. (2 *Pars. on Cont.*, 184; 6 *T. R.*, 710; Moakley *a.* Riggs, 19 *Johns.*, 69; Carpenter *a.* Stevens, 12 *Wend.*, 589; West *a.* Newton, 1 *Duer*, 277; Beebe *a.* Johnson, 19 *Wend.*, 500; *Story on Sales*, § 251; 2 *Story on Cont.*, § 968.)

II. The complaint should have been dismissed when the plaintiffs rested. 1. Because it appeared that the plaintiffs were not ready to deliver, and did not tender the quantity stipulated. (Fischell *a.* Scott, 28 *Eng. Law & Eq. R.*, 404; cases cited, *supra.*) And evidence tending to establish a waiver on the part of the defendants does not cure this defect. (Baldwin *a.* Munn, 2 *Wend.*, 399; Holmes *a.* Holmes, 9 *N. Y.* (5 *Seld.*), 525.) 2. Because it appeared that the plaintiffs were not ready to deliver, and did not tender at the time stipulated—namely, when landed. (Friess *a.* Rider, 24 *N. Y.*, 367; 2 *Story on Cont.*, § 970, a; § 971.) Time becomes material in an agreement where delay diminishes the value of the thing contracted for. (Decamp *a.* Fear, 5 *S. & R.*, 323.) 3. Because it appeared that the plaintiffs were not ready to deliver, and did not tender in the manner stipulated—namely, from alongside the vessel. No law, statute, rule, or regulation prevented the plaintiffs from delivering according to contract: such delivery is a condition precedent; the defendants were entitled to, and did insist upon its performance, and without such condition would not have made the purchase. (Worsley *a.* Wood, 6 *T. R.*, 720; 2 *Story on Cont.*, 543.)

III. The learned judge erred in directing the jury to find a

verdict for the plaintiffs, thus taking from the jury the question of fact whether the defendants did or did not demand from the plaintiffs the custom-house certificate. The testimony on this question is conflicting. (Purchase *a.* Mattison, 15 *Abbotts' Pr.*, 402; S. C., 25 *How. Pr.*, 161; Cobb *a.* Cornish, 16 *N. Y.*, 602; Gilbert *a.* Beach, *Ib.*, 606.)

By the Court.*—Moncrief, J.—This action is brought upon a written contract of sale of saltpetre, in plain terms, entitling the defendants to receive from the plaintiffs, when landed in Boston alongside of the ship Arabella, 733 bags crude saltpetre, to arrive on board the said ship; and there is an ample illustration in the bill of exceptions, in this case, of the peculiarities of mercantile contracts, and the necessity of giving construction to each according to the intent of the contracting parties, manifest from their respective contracts. By the sale note from Bullard to the Hazard Powder Company, following the decision in Havemeyer *a.* Cunningham (35 *Barb.*, 515, 521), the latter was entitled, as a purchaser of an invoice of goods then on board the ship Arabella, to whatever portion of the quantity sold arrived in a sound condition, and they received their one-half part of the invoice so purchased. The plaintiffs' contract calls for "the *one-half* of 1464 bags saltpetre;" and hence, in my view, differs most essentially from the agreement to deliver "½ of an *invoice* of saltpetre to arrive per ship Arabella, say about 783 bags, *more or less.*" . . . . The one can legally claim 732 bags of saltpetre from on board the vessel Arabella, and the other having bought the moiety of whatever is on board, and may arrive at the port of destination, of course is entitled to demand what may arrive. The distinction between the sale to the Hazard Powder Company and the cases cited from 35 Barb. (*supra*), is, that in the one there was no guarantee as to quality, and in the other "the sugar was to be of current quality clayed;" this, however, is immaterial in the present discussion, inasmuch as in both these instances, the contract of sale must be held to be absolute in the sense that the party was entitled to the thing he had agreed to buy, being then on board of the vessel. With reference to the contract

* Present, Moncrief, Robertson, and Monell, JJ.

made with the plaintiffs, it may be questionable whether they were bound to receive under it any greater number of bags than 732, being the one-half of 1464 bags of saltpetre on board of the ship Arabella, on the 12th September, 1855. If on that day, on board of that ship, there was in existence only 786 bags of saltpetre, it can need no argument to state, as a legal verity, that Mr. Bullard could not, by virtue of the contract, require the plaintiffs to accept 393 bags, being one-half of the saltpetre actually arriving at Boston, and delivered from on board the ship Arabella, unless their contract is construed to import a sale of ½ of the invoiced saltpetre then on board the ship Arabella.

It is an elementary principle of law, that if the right of property has not passed by the bargain, the purchaser cannot be made responsible for the price, unless the vendor can show that the article or chattel tendered for acceptance, fairly corresponded in quantity . . . . with the thing bargained for and agreed to be bought; for no man can be compelled to *take more than he agreed to buy*. . . . (*Add. on Cont.*, 238.) It will not be pretended that in either Havemeyer *a.* Cunningham (*supra*), or by virtue of the contract of Bullard with the Hazard Powder Company, the importer or vendor was devested of his property, or that the title to the goods passed to the vendee; the weight of the articles remained to be ascertained. (*Add. on Cont.*, 224, and cases cited; *Pars. Merc. L.*, 48.) The evidence fully establishes the fact in the present case, that the title to the goods remained in Mr. Bullard until the 7th of January, 1856; he could have assigned and transferred the title to the saltpetre on board the ship Arabella by the indorsement and delivery of the bills of lading which he then had, and which he continued to hold until after the arrival of the ship in Boston.

In confirmation of this view, Mr. Bullard abandons property to the underwriters, and receives value therefor from them, which property otherwise was owned by the plaintiffs, or by the defendants.

Again, the transaction between the parties on the 25th of September, 1855, cannot be treated as an absolute sale of 733 bags of saltpetre at that time; it does not appear that such a quantity, which could be claimed by the plaintiffs under their contract with Bullard, was in existence on board the ship Ara-

bella on that day; only 393 bags arrived at Boston, over which the plaintiffs exercised acts of ownership or control, or became entitled to the possession.

The contract of the plaintiffs with the defendants called for the delivery of 733 bags of saltpetre from on board the ship Arabella, to be taken when landed alongside the ship at Boston; the plaintiffs could not be required to transfer any greater, and the defendants as plainly cannot be compelled to accept any less number of bags of saltpetre than they had agreed to purchase and the plaintiffs contracted to deliver.

The tender of a number less than 733 bags of saltpetre did not satisfy the requirement of the contract on the part of the plaintiffs, and the defendants were not bound to accept. Shields *a.* Pettie (4 *N. Y.* (4 *Comst.*), 122; 2 *Sandf.*, 262) is in striking analogy with the agreement between these parties, and is decisive of the question involved.

I am of opinion that the learned judge erred in not directing a verdict for the defendants; and, in my opinion, the refusal to dismiss the complaint upon the plaintiffs resting their case, was also erroneous: a verdict of the jury for the plaintiffs upon the evidence then introduced cannot be sustained.

In this view, the other exceptions need not be, and are not noticed.

The exceptions should be sustained, and a new trial directed, with costs to abide the event.

Robertson, J.—The sale in this case was of goods *to arrive;* it was, therefore, a mere executory contract, conditional on their arrival (Shields *a.* Pettie, 4 *N. Y.*, (4 *Comst.*), 122; 2 *Sandf.*, 262; Benedict *a.* Field, 16 *N. Y.*, 595; 4 *Duer*, 154), and not a transfer of title. The only question is, whether the contract was for the delivery of so much of the amount sold as should arrive, and therefore apportionable, or only of the specified amount. In Havemeyer *a.* Cunningham (35 *Barb.*, 515), the contract was of an invoice of goods of a certain number of tons, "more or less," and for that reason only it was held that the seller was only bound to deliver what arrived, and was not responsible for any loss on the voyage.

In the present case, the contract was for a definite number of bags of saltpetre, although not for a specified quantity. There

does not seem to be any good reason why a purchaser of goods at sea, of whose quantity he cannot be presumed to be aware, should be compelled to accept part of the quantity bought by him, any more than if they were in a distant warehouse. The fact that such goods have not arrived merely postpones the execution of the contract, and, without some qualification in its terms, ought not to affect the right of either party. In the case last cited, the principal question was, whether the terms "to arrive on or before" a certain day used in it made the sale absolute or conditional on the arrival on or before that day; and it was held to be absolute on arrival, whenever it happened, merely postponing the time of delivery,—distinguishing it from Russell *a.* Nicoll (3 *Wend.*, 112), only by the insertion of the name of the vessel. The obligation of the seller only to deliver what arrived, in such case sustains a correlative obligation on the part of the buyer to accept it. But unless the former obligation had been limited by the use of the words "more or less" and "invoice," the purchaser, by whom the action was brought, could not have been enabled to recover for non-delivery of the cargo actually arrived, if less than the amount specified as embracing the whole of the contract. All the reasons which in the case of any other contract entitle the party seeking to enforce it, to reject a partial and require a full performance, equally apply to such a one as this. Less than the full amount contracted for may baffle all the purposes of the buyer. His right to insist on a complete performance is established by numerous authorities.

Besides, there was on board, on the arrival of the vessel, the full number of bags of saltpetre required to be delivered by the contract, although nearly one-half had been lessened in bulk by the dissolving of part of the contents by water. These were transferred to the underwriters by the plaintiffs or those under whom they claim by abandonment. There was no guarantee of quality in the contract, and the price was to be regulated by weight. I see no reason why the defendants were not entitled to whatever remained of the saltpetre in the bags which were abandoned. It was held in Havemeyer *a.* Cunningham (*ubi supra*), that the purchasers were entitled to recover for the part of the cargo alleged to have been injured: they were at least entitled to an election. Possibly, if such goods were unmer-

chantable, as charged in the complaint, as the defendants would not be bound to accept them, the plaintiffs were not bound to tender them; but the evidence did not sustain this view.

Without regard to the mode of delivery, I therefore concur in the opinion that the defendants are entitled to a new trial, with costs to abide the event.

New trial ordered.

COOK *a.* BIDWELL.

Supreme Court, First District; General Term, March, 1864.

EXAMINATION OF ADVERSE PARTY BEFORE TRIAL.

An order for the examination of the adverse party, under section 391 of the Code, is allowed as a matter of right, upon proof that the action is at issue, and that the applicant desires such examination as to matters material to the issue.

Appeal from an order denying a motion to set aside an order for the examination of defendant before trial.

The action was by John F. Cook against John A. Bidwell. The facts are sufficiently stated in the opinion.

Richard Winne, for the appellant.—I. The order of the 4th of November, 1862, requiring the defendant to appear, &c., should have been set aside. No order was necessary at that stage of the proceedings, even if the plaintiff was entitled to examine the defendant before the trial. The proper proceeding was to serve on the defendant a summons. (Voorhies' Code, § 392, and cases; Gaughe *a.* Laroche, 14 *How. Pr.*, 453; S. C., 6 *Abbotts' Pr.*, 284.) The order should for that reason be reversed.

II. The defendant cannot be examined before the trial except conditionally, the same as any other witness, and for the same reason. (*Code*, § 399, amended 1862.) Prior to 1847, a party to an action could not be examined as a witness in any manner or on any account, with perhaps a single exception. By the Laws of 1847, 630, ch. 462, a party might examine an adverse party under certain circumstances and with certain restrictions. The

provisions of this act are embodied in the Code and are now sections 390–392. At the time of the enactment of the Code, and until 1857, a party to an action could only be examined by virtue of the provisions of sections 390, 391. There was no other mode of examining a party. Section 399 did not authorize the examination of a party. Sections 390, 391, in the Code as now printed, were sections 344, 345. (*Laws of* 1848, 559, ch. 379, sections 344, 345.) These sections have never been amended since the adoption of the Code, except a verbal amendment to section 391 (345,) in 1849. Section 399, as originally passed, then 352, did not authorize an examination of a party, but on the contrary expressly prohibited it. Section 398, originally 351, has not been changed since the Code was adopted, and provides that "no person offered as a witness shall be excluded by reason of his interest in the event of the action." A reference to these provisions of the Code shows the necessity of these sections 390 and 391, to enable the party to have the benefit of examining his adversary if he saw fit to do so. It was the only way in which he could examine an adverse party. In 1857, section 399 was amended, permitting a party to testify in his own behalf. Various amendments have been made to that section, until, in 1862, it provides that a party may be examined in the same manner and subject to the same rules of examination as any other witnesses. If a party is to be examined the same "as any other witnesses," it follows that he cannot be examined before the trial except by commission, or on an order that he be examined conditionally under the statute, and for the same reason that the statute authorizes the examination of a witness otherwise than at the trial.

Miller, Peet & Nichols, for the respondent.—I. The examination of an adverse party before the trial, at the option of the party seeking the examination, is a matter of right granted by section 391 of the Code. (Green *a.* Wood, 6 *Abbotts' Pr.*, 277; Taggard *a.* Gardner, 2 *Code R.*, 82; Leeds *a.* Brown, 5 *Abbotts' Pr.*, 418; Chichester *a.* Livingston, 3 *Sandf.*, 718; Report of Commissioners of Code, 1847.)

II. If the judge has discretion to refuse the examination before trial for good cause shown, it is not good cause for such refusal that the party sought to be examined prefers to testify

at the trial, and offers to stipulate that he will attend for that purpose. (Green *a.* Wood, *Supra.*)

III. The existence of this right is proved by the explicit language of the Code (§ 391), and by the history of the legislation on this point. 1. The Legislature, prior to the Code (*Laws of* 1847, 630, ch. 462), gave the absolute right to examine an adverse party in the same manner as any other witness—orally, on commission, or *de bene esse.* That contemplates an examination on the trial, or, in certain cases, even before issue joined. 2. The Report of the Commissioners of the Code refers to the act of 1847, and says, "We think it important to extend it, so as to permit the examination to take place before the trial, at the option of either party," and then assigns satisfactory reasons for this proposed extension. The report was adopted in this particular. 3. The beneficial rights secured by the rules and practice prevailing in equity have been simplified and substantially preserved. 4. The chapter entitled "Examination of Parties," chapter 6, commences by declaring actions for discovery abolished, and then proceeds to provide substitutes. The next section provides, as explicitly as language can state it, that the order for any examination of a witness at the trial may, if that witness be the adverse party, be had before the trial, at the option of the party claiming it; and this is the only substitute for a bill of discovery.

Sutherland, J.—Section 390 of the Code provides, that a party to an action may be examined as a witness, at the instance of the adverse party, either at the trial, or conditionally, or upon commission, "in the same manner, and subject to the same rules of examination, as any other witness."

The caption or heading of the following section, 391, is, "Such examination also allowed before trial—Proceedings therefor."

The body of section 391 is: "The examination, instead of being had at the trial, as provided in the last section, may be had, at any time before the trial, at the option of the party claiming it, before a judge of the court, or a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined shall not be compelled," &c.

The order made by the judge, on the application of the plaintiff, that the defendant appear and be examined in this action as a witness, was made on an affidavit, showing that the action was at issue, and stating certain other facts, tending to show that the plaintiff desired such examination as to certain matters material to the issue, but the affidavit did not show that the defendant was about to leave the State, or state any other fact tending to show that he would not be able to attend the trial of the action; in other words, the affidavit did not show any right to examine the defendant conditionally.

The question then is, whether the plaintiff had an absolute right, under section 391 of the Code, to examine the defendant before trial, upon simply showing that the action was at issue, and that he desired to examine the defendant as to matters material to the issue.

In my opinion he had. I think the decision in Green *a.* Wood (6 *Abbotts' Pr.*, 277) was right,—so far, at least, as it relates to this question.

The doubt as to the construction of section 391, must have arisen from the fact, that the caption to that section commences, "Such examination," &c.; and the body commences, "The examination," &c., when three examinations of the adverse party are mentioned in the preceding section (§ 390). But it is plain that the words, "Such examination," and the words, "The examination," refer to the examination of the adverse party generally, and not to either of the examinations of such party provided for in the previous section, at the trial, conditionally, and upon commission. It is plain that by section 391 it was intended to provide for another examination of the adverse party. Any other construction of section 391 would make it useless; for the examination of the adverse party at the trial, conditionally, and upon commission, is fully provided for by section 390. Moreover, it would have been absurd to say that a party might be examined conditionally or upon commission, at the option of his adversary, when the right to such examinations was carefully regulated by law, without repealing or abrogating such law, and it would have been useless to say that a party might be examined at the trial at the option of his adversary, after giving the right of examination at the trial. The option to be exercised by the party claiming the examina-

tion under section 391, is between the examination at the trial, and before the trial. I do not see why the right to the latter examination, under section 391, is not just as absolute as the right to the former under section 390. Neither examination can be had except in an action after issue, and as to matters pertinent to the issue.

I do not see that the amendment, in 1862, of section 399 of the Code, has any bearing on the question in this case.

The order appealed from should be affirmed, with $10 costs.

LEONARD, J.—I concur. The order of affirmance may fix the time for proceeding with the examination.

CLERKE, J.—I concur.

SUYDAM *a.* THE GRAND-STREET AND NEWTOWN RAILROAD COMPANY.

Supreme Court, Second District; General Term, March, 1864.

NEGLIGENCE.—COLLISION.—PERSONAL INJURIES.—NEW TRIAL.—CITY COURT OF BROOKLYN.—WITHDRAWING CAUSE FROM JURY.

Where, in an action to recover damages occasioned by the collision of vehicles in the highway, it appeared, that the collision was occasioned by the plaintiff's unwisely and unnecessarily turning his horse, so as to throw the rear part of his cart against the defendant's car,—*Held*, that a verdict for the plaintiff was against evidence.

In cases of collision between a horse-car upon a street railroad and an ordinary vehicle which can traverse all parts of the street, any presumption of negligence is against the driver of the latter.

It is the duty of the City Court of Brooklyn to grant a new trial where a verdict against evidence has been rendered.

An order of the City Court of Brooklyn denying a motion for a new trial is reviewable on appeal.

Where, from the position and circumstances of the parties, a jury is likely to be influenced by a mistaken, though honorable, sympathy for the feeble against the strong,—*e. g.*, an humble citizen against a wealthy corporation,—it is peculiarly the duty of the court to withdraw the case from the consideration of the jury, if a verdict in accordance with such sympathy would be against evidence.

Appeal from a judgment of the City Court of Brooklyn.

This action was brought by Rem Suydam against The Grand-street and Newtown Railroad Company, to recover $10,000 for personal injuries. The jury found a verdict for the plaintiff for $1,500. After the denial of defendant's motion for a new trial, judgment was entered, and the defendant appealed. The material parts of the testimony in the court below are fully stated in the opinion.

Jasper W. Gilbert, for the appellant.—I. The case ought not to have been submitted to the jury, because there was not any evidence upon which the jury were authorized to find that the defendant had been guilty of any negligence or want of care. On the contrary, the legal presumption was that the defendant did its duty, and there was no evidence sufficient to overcome this presumption. But the evidence showed that the plaintiff, if he had used proper care, might have avoided the accident.

II. The motion for a nonsuit should have been granted, for the reason that the evidence clearly and unquestionably established the fact that the injury to the plaintiff was caused by his own negligence, inattention, or want of care. The jury were not authorized to find that the injuries were occasioned solely by the negligence of the defendant, or that the plaintiff had proved that they were caused without any fault on his part; and so the court charged, if the jury believed the defendant's witnesses. There was nothing to warrant any distrust of their testimony. The court, therefore, should have given it its due weight, and decided accordingly, instead of submitting it to the jury under an "if." (Toomey *a.* London, &c., R. W. Co., 91 *Eng. C. L. Rep.*, 146; Johnson *a.* Hudson River R. R. Co., 20 *N. Y.*, 65, 73; Dascomb *a.* Buffalo & State Line R. R. Co., 27 *Barb.*, 221; Brooks *a.* Buffalo & Niagara Falls R. R. Co., 25 *Ib.*, 600; Mangam *a.* Brooklyn City R. R. Co., 36 *Ib.*, 230; Ernst *a.* Hudson River R. R. Co., 32 *Ib.*,, 159; Button *a.* Hudson River R. R. Co., 18 *N. Y.*, 248, 254; Wilds *a.* Same, 24 *N. Y.*, 430; *S. C.*, 23 *How. Pr.*, 492.) Upon the most favorable view for the plaintiff, it was a case of mutual negligence, and in such a case the defendant is entitled to the verdict. (18 *N. Y.*, *supra.*)

III. The court below, for the reasons above assigned, erred in refusing a new trial, and this court has power to correct the error. The statute creating the City Court makes all laws regulating the practice of the Supreme Court, and the course of procedure therein, applicable to and binding upon the City Court, and also grants to the City Court the power to review its decisions, and to grant new trials. (*Laws of* 1849, 171, ch. 125, § 4.) When a statute authorizes the doing of a thing for the sake of justice, the word "may" is the same as the word "shall." (Macdougall *a.* Patterson, 11 *Com. B.*, 755, 772; Mayor, &c., of N. Y. *a.* Furze, 3 *Hill*, 612.) The appellate jurisdiction of the Supreme Court is comprehensive enough to correct such an error as this. This question is *res judicata*, in this district at least, by the cases of Van Pelt *a.* Blake, and Chadsey *a.* Brown, MSS. And it seems clear, upon looking into the City Court act and the Code. (*Laws of* 1850, 148, ch. 102, § 1; *Code*, § 330.) The order appealed from is an intermediate order, and the judgment was entered afterwards, and it manifestly involves the merits and affected the judgment.

IV. The court below erred in charging that plaintiff might remain on the track until he had notice of the approach of a car, without being negligent.

William J. Huff, for the respondent.—I. The plaintiff fully made out his case. He had shown that he was free from negligence, and that the collision occurred solely by the negligence of the defendant. (Johnson *a.* Hudson River R. R. Co., 20 *N. Y.*, 65, 72; Button *a.* Same, 18 *Ib.*, 248; Fero *a.* Buffalo and State Line R. R. Co., 22 *Ib.*, 209; Wilds *a.* Hudson River R. R. Co., 24 *Ib.*, 430.)

II. 1. The weight of evidence was not in favor of the defendant, and there was a preponderance of testimony in favor of the plaintiff. The whole testimony on the part of the defendant, as to swaying movement of the plaintiff's horse, and that cart was parallel with car, and as to distance between car and cart, and that car had passed cart, was contradicted by plaintiff's witnesses. The plaintiff used every care to avoid a collision. There was no negligence whatever on his part. There was no swaying of his horse. The jury disbelieved the testimony of defendant's witness, Buckman. The collision oc-

curred before the stanchion was broken, and the jar threw the tail end of the cart in towards car, and the load on cart struck stanchion. 2. The whole case showed that the defendants were guilty of negligence, which contributed to the injury. They were going at an unusual rate of speed. They did not give plaintiff time to get out of their way. Their car did not check its speed until brought up by actual forced and wedged contact with the plaintiff's cart and load. 3. There was no negligence whatever on the part of the plaintiff; all that the law required of him is the use of ordinary care. The finding of the jury on the whole case is correct, and should not be disturbed.

III. The horse-cars of a city are bound to use the public highways, through which they are run, in a manner similar to the use made of the streets by the omnibuses which they are displacing: the only difference between them and the omnibus is, that they are confined to their rail; the mere fact of their having a track in a public street does not give them the exclusive right to the street occupied by their track. The judge's charge was correct; there must be mutual accommodation between the cars and vehicles on the street, no driver having a right to negligently and wilfully hinder a car. (Wilds *a.* Hudson River R. R. Co., 24 *N. Y.*, 430.)

IV. Ordinary care is all that the law requires of the plaintiff. Where evidence is conflicting, the court will not disturb the finding of the jury; their finding of fact being conclusive. (Fleming *a.* Hollenback, 7 *Barb.*, 271; Keeler *a.* Fireman's Insurance Co., 3 *Hill*, 250; Eaton *a.* Benton, 2 *Ib.*, 576; Adsit *a.* Wilson, 7 *How. Pr.*, 64; Stoddard *a.* Long Island R. R. Co., 5 *Sandf.*, 180.) Defendant's main witness, Buckman, contradicted himself by saying he was superintendent, and that he was not; and was contradicted in other important points.

Brown, J.—This is an appeal from the judgment of the City Court of Brooklyn, entered upon a verdict in favor of the plaintiff for $1,500, and from an order denying a motion for a new trial. The action was for damages for negligently causing a railway car to strike the cart of the plaintiff, from which he was thrown and injured in his person.

It appeared by the proof that there are two railway tracks

laid down in the centre of First-street, in Brooklyn, the carriage-way therein being thirty feet wide. The space occupied by the rails is thirteen feet seven inches. The defendant operated a horse railroad upon the street. The plaintiff is a cartman, and at the time of the collision, June 1st, 1861, was driving a cart about six feet wide, and eight feet six inches in length, standing in front of the platform, and proceeding southwardly along First-street, on the westwardly railroad track. The car of the defendant approached the plaintiff, going in the same direction. There is some difference of opinion amongst the witnesses of the plaintiff as to the rate of speed of the car, some thinking it rapid, others not more than the usual rate; whilst those of the defendant thought it not over four and a-half or five miles an hour. In the view I entertain, the difference in the rate of speed is not material. At the distance of some twenty feet from the cart the car-bell was rung, and the car nearly stopped, or brought down to a walk; on hearing which, the plaintiff turned off to the left, to allow the car to pass. The car was run some distance slowly, and had gone two-thirds of its length past the cart, and within eighteen or twenty inches from it, when the collision occurred, and the plaintiff was thrown from his cart into the street and seriously injured. The cart was heavily loaded with agricultural implements, some of which projected one foot, and others two feet beyond the rear or hinder end of the cart, the axle being at the centre. The collision occurred between the car and the cart at a point two-thirds of the way from the front part of the body of the latter and the hinder end of the cart; or what is more probable, indeed quite certain, the agricultural implements projecting therefrom, which were the platform of a reaping machine and the handles of two horse-hoes. The car is sixteen feet long, with nine stanchions, there being a distance of eighteen inches between each stanchion, the third stanchion from the hind end of the car and the sixth from the forward end being the point of collision. About these facts there is no conflict of evidence that I can see; indeed, many of them are derived from the testimony of the plaintiff as well as that of the defendant. For all the purposes of this opinion, I assume them to be true. The collision between the two vehicles, which resulted in the injury to the plaintiff, is not without an adequate cause, which he is bound to explain and estab-

lish to the satisfaction of the court, before he can be allowed to retain his verdict. This is a burden which every plaintiff voluntarily takes upon himself when he resorts to a court of justice for redress, and from which neither the court nor the jury have power to relieve him. The latter may give him a verdict, but unless supported by the evidence it cannot be maintained. In cases of this kind he must show that the collision proceeded exclusively from the negligent acts of the defendant, and not from his own negligent acts, or his own negligent acts combined with those of the defendant. Both vehicles were going over the street in the same direction, in the exercise of a common right, side by side, when the hinder end of the cart came in contact with the side of the car, and the question is, through whose imprudence or want of care did it occur?

This same case, upon substantially the same evidence, was before us at the general term in February last, and we then took occasion to say, "that a cartman's cart is a vehicle which traverses all parts of the street, crossing and recrossing, going backwards and forwards, and turning to the right or to the left, at the will of the driver, its passage-way limited only by the limits of the street. Not so with a railway car. It is irrevocably fixed to a given track, laid down longitudinally with the street. To this line the car must adhere, and from which it cannot be inclined or deflected for any purpose. It is quite evident, therefore, that where a cartman's cart and a railway car are progressing side by side, with a space of 16 or 24 inches between them, there can be no collision if each adheres to the track which the law assigns to it. And if a collision does occur under such circumstances, the presumption of negligence is altogether against the driver of the cart and not against the conductor of the railway car, for the obvious reason that the former can deviate and depart from his track, which the latter cannot do. One of the two must incline towards the other, or there can be no contact; and as the cart can be inclined and deflected towards the railway car at the pleasure of the driver or by his indifference or carelessness, while the latter is inexorably bound to its iron rail whatever might be the will or the misconduct of the conductor, there can be no other presumption but against the care and good conduct of the cart-driver."

Both the cart and the car were proceeding in the same direc-

tion, the car on the right and the cart on the left hand. Two-thirds of the car passed the cart without contact, and had there been no change in their relative position, there would have been no contact; that is, if each of them had proceeded directly along the street and without deviation, the remaining third part of the car would have been passed freely and there would have been no collision, and had they inclined towards each other, the sides of both vehicles would have become the point of contact. This was not so, however: the side of the car and the end of the cart came in contact. By what means, then, was the hinder end of the cart brought in contact with the side of the car? The car could be moved forward and backward, but not to the one side or the other. It was not possible to move the car so as to produce the actual result. It was produced by a movement of the cart, and by no other means. The cart, with the projecting load, was ten feet six inches long, six feet of which was behind the axle. If the head of the horse was pulled by the driver to the left, even for a small space, it would place the cart diagonal to the railway and bring the end of it instantly in collision with the car. That this actually took place may be inferred from the injury done to the third stanchion from the rear of the car, and the broken end of the platform of the plaintiff's cart. It is also proved by the sum of the testimony on both sides. Rem Suydam, the plaintiff, himself testifies: "I was pulling to the left when the collision took place. I knew the car struck my load, which projected about two feet to the rear of my cart. I suppose the car struck the tail end of my cart." Patrick McQuinn, a witness for the plaintiff, testified: "The car struck the machinery on the right-hand corner of the tail of the cart with violence. It jarred the plaintiff off the cart." Again he says, "The horse was diagonal with the track, and the plaintiff kept the same direction until the collision." William S. Townsend, a witness for the plaintiff, says: "I observed the horse and cart turning off to the left. I saw the horse and part of the cart. The cart was ahead, and going the same direction as the car." Ira Buckman, a witness for the defendant, said: "I was standing on the step (of the car) on the left side; as we passed, my face was towards him (the plaintiff) and on a line with the side of the car. My face was sixteen or eighteen inches from the platform of the reaping-machine on

plaintiff's cart, which projected further than any thing on the load; that is, when my face passed the rear of the cart. After I told the car-driver to go on, the car began to get under way. Just before the collision, the horse swayed to the left and threw the hind end of the cart against the side of the car. All was done in an instant. This was after I told the driver to start up. This platform projected over the right side of the tail of the cart, and lay rather diagonally across the cart, and he stood by the other end of it in front. Our car hit the platform that was the point of collision. The platform slewed around, the cart-rung acting as a fulcrum, and the other end in that way knocked him off the cart. It broke the stanchion of the car, the third one from the hind end and sixth from the forward end. It broke out so that a piece fell on the ground." Again he says: "The car stopped within eighteen inches, or it would have broken another stanchion." George Bennett, another witness for the defendant, said: "The cart continued parallel with the car until we (the car) got nearly two-thirds past the rear end of the cart. Plaintiff was standing on the left-hand front corner. I saw him look towards the car; he pulled his horse to the left, and threw the end of the cart into the car. I saw the rear load of the cart coming towards the car as the plaintiff turned his head. It struck the car by the stanchion near the rear." Patrick Malone, a witness for the defendant, said: "When we commenced passing the cart, it was perfectly straight with us. I think we were twelve or thirteen inches from the rear of the cart." This is the evidence, and it leaves no manner of doubt upon my mind, that the accident was caused by the imprudent and mistaken act of the plaintiff in pulling his horse to the left, as he himself says, at the moment of the collision. It is in vain to say, in the face of the evidence, that he is without fault, and did not contribute largely to bring about the collision which resulted in his injury. It was the manifest duty of the jury to find a verdict for the defendant; and failing to do this, I think the City Court should have set aside the verdict upon the motion for that purpose. The remarks of the late Mr. Justice Barculo, in the case of Haring *a.* New York and Erie R. R. Co. (13 *Barb.*, 9), are peculiarly applicable to the present case. In speaking upon the duty of non-suiting a plaintiff, or setting aside a verdict where the plaintiff has con-

tributed to the injury, he says: "We cannot shut our eyes to the fact that in certain controversies between the weak and the strong, between an humble individual and a gigantic corporation, the sympathies of the human mind naturally, honestly, and generously run to the assistance and support of the feeble and apparently oppressed, and that compassion will sometimes exercise over the deliberations of a jury an influence, which, however honorable to them as philanthropists, is wholly inconsistent with the principles of law and the ends of justice. There is therefore a manifest propriety in withdrawing from the consideration of the jury those cases in which the plaintiff fails to show a right of recovery."

The judgment, and the order denying the motion for a new trial should be reversed and a new trial granted, with costs to abide the event.

SCRUGHAM and LOTT, JJ., concurred.

KOLLS *a.* DE LEYER.

Supreme Court, Second District; General Term, March, 1864.

MARRIED WOMAN.—BENEFIT TO THE ESTATE.—COVENANTS OF TITLE.—DEFECT OF PARTIES.

A married woman is liable for a breach of the covenants of a deed which she has given. The covenants induce the purchase, enlarge the price, and thus benefit her estate.

The power to use, grant, devise, and convey real property, conferred upon married women, includes by implication the power of giving the usual covenants for title.

The joinder of unnecessary parties-defendant does not justify a demurrer for defect of parties.

Appeal from an order overruling a demurrer to the complaint.

This action was brought by Benedix F. Kolls against Margaretta De Leyer and Anthony De Leyer, to recover from the separate estate of Margaretta the sum of $111.79, the amount which plaintiff had been compelled to pay to redeem from a tax-sale real estate which the defendants had sold to him with

covenants of warranty. The defendant Margaretta demurred to the complaint, setting forth twenty-one grounds of objection; among others, that there was no cause of action, and that there was a defect of parties-defendant. The demurrer was overruled by Mr. Justice Lott, and the defendant appealed.

Francis Byrne, for the appellant.—The supposed cause of action is sought to be enforced upon the personal covenant of the wife. Her "personal engagement is void, as it always was by the rules of the common law." (Yale *a.* Dederer, 18 *N. Y.*, 265; 22 *Ib.*, 450; Watkins *a.* Abrahams, 24 *Ib.*, 72; Rose *a.* Bell, 38 *Barb.*, 25; Dominick *a.* Michael, 4 *Sandf.*, 374; Switzer *a.* Valentine, 4 *Duer*, 96; Noyes *a.* Blakeman, 6 *N. Y.* (2 *Seld.*), 567; Jackson *a.* Vanderheyden, 17 *Johns.*, 167; Jaques *a.* Methodist Episcopal Church, *Ib.*, 549; Carpenter *a.* Schermerhorn, 2 *Barb. Ch.*, 314; Barton *a.* Beer, 35 *Barb.*, 78.) The Act of 1849, 528, ch. 375, § 1, gives the power to take, hold, and convey, &c. No express contract was made in the deed, charging the separate estate of the defendant Margaretta. The separate estate, upon which the charge is claimed to have been made, or against which it is sought, is not described. The real estate, referred to in the complaint, ceased to be hers on the conveyance to plaintiff. (Rogers *a.* Ludlow, 3 *Sandf. Ch.*, 104; Coon *a.* Brook, 21 *Barb.*, 546.)

George H. Fisher, for the respondent.—I. The only question of importance is, whether, under the circumstances stated, an action lies to charge the remaining separate estate of the defendant, a married woman, with the damages which have resulted from the breach of warranty. The cases and the law are summed up in (Yale *a.* Dederer, 22 *N. Y.*, 450), and the result may be stated in language used by the court: "In order to create a charge, &c., on estate of married women, the intention to do so must be declared in the contract, or the consideration must be obtained for the direct benefit of the estate itself." 1. In this case the contract is the warranty contained in the deed. The consideration was the consideration expressed in the deed. 2. No possible consideration could move more directly to the estate, for its benefit, than a consideration paid to the grantor for a conveyance of a portion of that estate. It is ob-

servable that this incumbrance was a tax; and it does not admit of doubt that the payment of a tax, lawfully imposed on an estate, or a portion of an estate, is for the benefit of that estate generally, or for the benefit of the whole estate.

II. It is settled that the joinder of a defendant, more than is necessary, does not justify a demurrer. The "defect of parties" spoken of in the Code, is a deficiency of parties. (Peabody *a.* Washington Mutual Insurance Co., 20 *Barb.*, 339; Brownson *a.* Gifford, 8 *How. Pr.*, 389; New York & New Haven R. R. Co. *a.* Schuyler, 17 *N. Y.*, 592; S. C., 7 *Abbotts' Pr.*, 41; Gregory *a.* Oaksmith, 12 *How. Pr.*, 134; Philips *a.* Hagadon, *Ib.*, 17; Manning *a.* State of Nicaragua, &c., Transit Co., 14 *Ib.*, 517; Bowers *a.* Tallmadge, 16 *Ib.*, 325.)

By the Court.*—Brown, J.—This is a demurrer to the plaintiff's complaint. The causes of demurrer are very numerous, and all of them but one very frivolous.

The defendant is a married woman, having a separate estate of her own. Prior to the 1st day of February, 1858, and since the passage of the acts in regard to married women, and giving them the right to acquire, hold, use, grant, and convey real property, the same as *femes sole*, she acquired by purchase a lot of ground in the twelfth ward in the city of Brooklyn, the title to which she held in fee in her own right. On the 15th day of February, in the same year, being so seized of the said lot of ground, she conveyed the same to the plaintiff by the usual deed of conveyance, with covenants of seizin, and that the same were free from incumbrances of every description. There has been a breach of the last of these covenants, the estate at the time being incumbered with certain taxes, which the grantee (the plaintiff) has been compelled to pay to save the estate from sale, &c. All these facts appear by the complaint.

The question raised by the demurrer is, whether the duty, debt, or obligation created by the covenants in the deed were directly beneficial to the estate of the grantor. This cannot be a debatable point. It is too plain, I think, for argument. The obvious effect of the covenants in a deed of conveyance is to

* Present, Brown, P. J., Lott and Scrugham, JJ.

assure the title and enlarge the purchase-money. No one doubts that the reason why the grantee demands, and the grantor makes these covenants, is to afford the former a complete indemnity to the extent of the purchase-money, should the title fail. This duty, assumed by the grantor under the contract, may be, and often is, the principal inducement to the purchase. It enlarges the purchase-money, and thus to an extent more or less is clearly for the benefit of the estate of the grantor. It may be said, although the remark is not necessary to the decision of the demurrer, that covenants of warranty, seizin, quiet enjoyment, are incident to, and usually attend upon, conveyances of real estate; and in the absence of all limitation and restraint upon the power of a married woman, the Legislature, when conferring the right to acquire, use, grant, devise, and convey real property in the same manner as *femes sole*, must have intended conveyances in the usual manner, and with the usual covenants, to assure the title.

The order overruling the demurrer should be affirmed, with costs.

JOHNSON *a.* TUTTLE.

New York Common Pleas; General Term, July, 1863.
Again at same Term.

INTEREST ON JUDGMENT.—SUPPLEMENTARY PROCEEDINGS.—PERSONAL SERVICE.

Every judgment bears interest from the time of perfecting it.

The payment of the principal sum due upon a judgment, is not a bar to supplementary proceedings to collect the interest.

Where a judgment-debtor, who had been duly served in supplementary proceedings with an order for his appearance, moved to vacate the order, which motion was denied, with a direction that the debtor appear on a subsequent day,—*Held*, that the second order need not be personally served.

I. *July*, 1863.—Appeal from an order in supplementary proceedings.

Judgment was recovered by Nathaniel Johnson against Smith Tuttle in the Second District Court, New York city, for $43.88. After the filing of the transcript, &c., an order was made by one of the judges of this court requiring the defendant to attend before a referee and be examined concerning his property. The other facts are sufficiently stated in the opinion. The order appealed from was made August 19th, 1862. The appeal was by the defendant.

Smith Tuttle, appellant, in person.—I. The judge had no jurisdiction to grant the second order. The interest upon a judgment is an incident to it, not a part of it.

II. The $8 costs was improperly allowed. If the non-payment of interest and disbursements gave jurisdiction, the defendant's motion should have been merely denied.

Peter J. Gage, for the respondent.

By the Court.*—Daly, F. J.—When the order of July 17, 1863, was served, there was due upon the judgment $43.88, together with the disbursements attending the issuing and return of the execution, and the filing of the transcript, and interest from the perfecting of the judgment. Every judgment bears interest from the time of perfecting it. (*Laws of* 1844, 508, ch. 324, § 1; Sayre *a.* Austin, 3 *Wend.*, 496.) Between the service of the supplementary order and the day for appearance under it, the defendant paid $44. The referee not being present upon the return-day, the plaintiff obtained another supplementary order, directing the defendant to appear before the referee at another day. The defendant insists that the judge had no jurisdiction to grant this order, as the defendant had then paid more than the amount for which judgment had been entered, the interest and disbursement, accruing after the entry of the judgment, being, as he insists, merely incident to the judgment, and forming no part of it.

The interest and the disbursements are collectable upon the execution; and by the Code (§ 292), as long as any part of the execution remains unsatisfied, the judgment-creditor is entitled to an order requiring the debtor to appear and answer respect-

* Present, Daly, Brady, and Hilton, JJ.

ing his property. This was the case here. The first order having fallen through in consequence of the absence of the referee, the plaintiff was entitled to another order, as the interest and disbursements, which were collectable under the execution, still remained unsatisfied. The judgment-creditor, moreover, was entitled to his disbursements and costs upon the proceedings supplementary. The defendant moved to set aside the second order. The judge refused to do so, unless the defendant would pay the plaintiff $8 costs. As the defendant was not entitled to have it set aside as a matter of right, he could have it only upon such condition as the judge saw fit to impose. Upon the failure to comply with this condition, the judge directed the defendant to appear and be examined before the referee on the 3d of September, 1862. The defendant refusing to do either, appealed from the order. The appeal must be dismissed. If the defendant will not accept the condition, he must appear before the referee and be examined. The order below must be affirmed; and as the time has gone by for the appearance of the defendant before the referee, the plaintiff may obtain another order, directing him to appear at a future day.

Hilton and Brady, JJ., concurred.

Order affirmed, with $10 costs.

II. *July*, 1863.—Appeal from an order allowing substituted service.

A second appeal in the same action was decided at the same term. On an affidavit of the plaintiff's attorney, showing that he had vainly attempted to serve upon the defendant the order of August 19th, 1862, and setting forth numerous visits to defendant's office, &c., an order was made directing that the order of 19th August be served in the manner required in cases of substituted service. The defendant, on an affidavit setting forth his recent continued absence from the State, moved to vacate the order directing substituted service on the merits, and for irregularity. His motion was denied, and he appealed.

Smith Tuttle, appellant, in person.—I. The order for substituted service could not be made except upon the return or affidavit of a sheriff, deputy sheriff, or constable. (*Laws of* 1853, 974, ch. 511.)

II. The facts are not set forth showing that appellant had evaded or attempted to evade service.

Peter J. Gage, for the respondent.

Daly, F. J.—There is no ground whatever for this appeal. The order was served in the mode required by section 409 of the Code. The defendant is an attorney, and his office being closed, so as not to admit of service, then the paper was left at his residence with a person of suitable age and discretion. The order for substituted service, under the statute of 1853, was entirely unnecessary, and the fact that the affidavit upon which it was obtained was insufficient, was immaterial. The order in the case was one simply extending the time for defendant to comply with the terms of an order upon which he had been heard, and could therefore be served in the mode pointed out by section 409.

Brady and Hilton, JJ., concurred.

Order affirmed, with $10 costs.

PACKARD *a.* WOOD.

Supreme Court, First District; General Term, March, 1864.

Change of Parties.—Bringing in Third Persons.

Under the Code of Procedure, a defendant is not entitled to compel an assignee of the cause of action pending the suit to become a plaintiff without his consent.*

* In Newton *a.* Milleville Manufacturing Company (*Supreme Court, First District; Special Term*, 1858), the plaintiff supposed, in ignorance of the true name of the defendants, that they were a corporation, and therefore sued them by the

If there be inherent power in the court to grant such relief, it is a matter of discretion, and a refusal to entertain the application is not reviewable on appeal.*

name in which they transacted their business. Having afterwards ascertained that the name used was not a corporate name, but that used by three persons who were the real defendants, the plaintiff asked leave to substitute their names as defendants, with proper allegations in the complaint.

Held, that section 175 of the Code met the case, and the motion should be granted without costs.

In NEILL *a.* WUEST (*Supreme Court, Chambers; November*, 1861), it was *Held*, 1. That an order granting the moving party a favor is not imperative upon him unless so expressed. 2. The usual order allowing a defendant to pay the demand into court, and substituting another party in his place, is not imperative, and the defendant who applied for it may, instead of taking advantage of it, put in an answer in the cause.

The facts are stated in the opinion.

BARNARD, J.—On motion of defendant, an order was made herein on the 16th of August, 1861, to the effect that, on payment by defendant into court of the amount claimed in the complaint, and interest, and on payment by defendant to plaintiff's attorney of costs of suit to date of the order, and $10 costs of opposing motion, George Seely be, from and after such payment, substituted in the place and stead of said John Wuest as defendant; and giving the defendant ten days to comply with the order, and giving George Seely twenty days to answer, from the time of service on him of a copy of the complaint. This order defendant did not comply with, but instead thereof put in an answer, the defence presented by which is, that the note in suit belongs to said Seely, and that he claims the amount of defendant.

Plaintiff now moves for an order requiring defendant to comply with the above order of August 16, 1861, or that in default thereof plaintiff have leave to enter judgment.

The present motion seems to be founded on the supposition that a compliance with the order of August 16, 1861, is imperative on the defendant. This, however, is a mistake. All orders made on motion of a party, granting that party a favor, or giving him leave to do some act upon the prior performance by him of some condition, are merely conditional and permissive. They are conditional, because they have no effect, unless certain terms are first complied with by defendant; and they are permissive, because conditional, inasmuch as the imposition of the condition is inconsistent with a mandate. The whole effect of a non-compliance with an order of this character, is to place the party in the same position as if his motion had been originally denied. Indeed, the contingency of a non-compliance is usually provided for in the order itself, by appending a clause to the effect that if the provisions of the order be not complied with in a specified time, then that the motion be denied, with costs. The order of August 16, 1861, is one of this conditional and permissive character.

It does not order and direct the defendant to pay into court, but simply author-

* In MILLARD *a.* VAN RANST (*Supreme Court, First District; General Term, September*, 1863), it was *Held*, by SUTHERLAND, INGRAHAM, and LEONARD, JJ., that an order refusing to open a default taken for want of an answer is not appealable.

Appeal from an order denying defendant's motion to have one Amory joined with plaintiff as a party.

The action was by Austin Packard against Loftis Wood, for an accounting between quasi-partners. Plaintiff had judgment for $29,322.10, from which defendant appealed to the general term, but without staying execution. Nearly the whole of the judgment had been collected by the sale of the defendant's real estate to one Peter B. Amory. On the appeal, it was ordered that the judgment be reversed, unless plaintiff submit to certain reductions. The defendant contemplated a further appeal. On affidavit showing these facts, and also that Amory owned nine-tenths of the claim and was himself prosecuting the claim, and that the plaintiff of record was insolvent, defendant moved that Amory be joined as a party plaintiff. The motion was denied by Mr. Justice Barnard, on the ground that "under the provisions of the Code the defendant cannot make such motion." The defendant appealed.

George C. Goddard, for the appellant.—I. The judge at chambers denied the motion expressly and solely on the ground that he had not the power under the Code to grant it. Should there

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izes one party to be substituted in the place of another, as defendant, upon certain terms being complied with in a specified time.

It is merely an interpleader order, and could not consequently be of a mandatory character. Nothing more is needed to show that the judge making this order regarded it as one granting a party a favor on his own motion, in terms, beyond the fact that one of these terms is payment of $10 costs of opposing motion, although the motion is granted. When a party asks for a favor, or for a matter of strict right, and the court grants it on his performance of certain imposed conditions, there is no authority in the court to compel the performance of the conditions, if the party elects not to take the favor or right which the court granted conditioned on such performance.

Thus, if a defendant moves to open a default taken against him for not answering, and for leave to answer, and the court grants his motion on condition that he bring into court in ten days the sum claimed by plaintiff, I apprehend the court has no power to compel him to bring the same into court if he elects not to take advantage of that part of the order which is in his favor, and omits to answer.

There being no authority to make an order requiring defendant to comply with the order of August 16, 1861, no order can now be made based on any default by defendant in complying therewith.

Motion denied, with $10 costs.

be any doubt whether an appeal would otherwise lie from the order, this would sustain the appeal. (McElwain *a.* Corning, 12 *Abbotts' Pr.*, 16; McMahon *a.* Mutual Benefit Life Insurance Co., *Ib.*, 28; Beach *a.* Chamberlain, 3 *Wend.*, 366.) The order affects a substantial right, as much so as an order to file a supplemental complaint. (St. John *a.* Croel, 10 *How. Pr.*, 253.) It is a right that the suit should be brought in the name of the real party in interest; and as much a right that it should be so continued, where, as in this case, the addition of such real party becomes important.

II. The power to grant the motion is given by the Code. And it existed in equity causes, which this is, before the Code. (See *Code*, § 173.) It is also within section 121, allowing a substitution in case of a transfer of interest. (Shearman *a.* Coman, 22 *How. Pr.*, 517.) In Dutcher *a.* Slack (3 *How. Pr.*, 322), a person was made co-plaintiff on plaintiff's application during the trial. *A fortiori*, may it be done on defendant's application. "The power of amendment under the Code, either before or after judgment, by adding or striking out the names of parties, is so comprehensive as to cover all cases which can arise and call for the interposition of the court." (Sherman *a.* Fream, 8 *Abbotts' Pr.*, 33.)

III. The lapse of time is of no importance, unless the delay has prejudiced the other party; of which there is no pretence. The motion is made on notice to Amory as well as to plaintiff.

Charles Jones, for the respondent.—I. The Code directs, that in case of a transfer of interest the action shall be continued in the name of the original party, but the court may allow the person to whom the transfer is made to be substituted. This can only be done on the motion of the assignee. (*Code*, § 121; Harris *a.* Bennett, 6 *How. Pr.*, 220; Sheldon *a.* Havens, 7 *Ib.*, 268.)

II. The defendant has no right to make the motion; and if he had, he has been guilty of laches in not moving before. More than four years have elapsed since he knew of the interest of Amory in the suit.

III. The court can only grant the motion that Amory now be brought in as a party: the order cannot be made retroactive.

Leonard, J.—The question here arises on appeal from an

order made at special term, denying a motion, on the part of the defendant, that Peter B. Amory be joined as a party-plaintiff in this action as of the time he became interested therein, and that the judgment and proceedings be so amended. It appears that the case has been tried, and judgment rendered for the plaintiff, and that an appeal has been taken, which is not yet determined; and a further appeal or a new trial is contemplated by the defendant, if the result of the present appeal is adverse to him.

The plaintiff assigned his interest in the demand in suit to Amory, who has made the advances to carry on the action since a trial was had before the referee. As the plaintiff retains a small interest only, and is now insolvent, the defendant desires that Amory, the responsible party, for whom the action is now prosecuted, shall be made a party-plaintiff, not only for the purpose of obtaining his liability for costs, but also for restitution in case the judgment shall be reversed, the said Amory having collected a large part of the judgment since its recovery.

The provisions of the Code relied on to sustain the motion are sections 121 and 173. Section 121 authorizes the action to be continued in the name of the original party, in case of a transfer of interest by means other than death, marriage, or disability. It provides also for allowing the person to whom the transfer is made to be substituted in the action. The latter clause relates to the particular subject of introducing new parties to an action, by reason of an assignment of the interest of an original party. The language of this paragraph is poor authority for compelling a person to whom an interest has been transferred, pending an action, to become a party thereto.

In my opinion, the application is to be allowed in the discretion of the court, when the person to whom the transfer has been made demands it, and on the application of such party only. I am unable to perceive that authority to permit or allow an act to be done, can be construed as authority to compel it, against the wish of the person in whose favor the provision is made.

I have not overlooked the case of Shearman *a.* Coman (22 *How. Pr.*, 517), decided at special term, but with great respect for the learned justice who made that decision, I am unable to concur in his views.

Section 121 has superseded the practice of the late court of

chancery in respect to the manner of conducting an action where a change or transfer of interest has occurred since the commencement of the action. As to the former practice, see Sedgwick *a.* Cleveland (7 *Paige*, 287).

Section 331 affords the defendant as effectual indemnity as to the costs, as he could have by substituting the assignee of the demand as the plaintiff herein. As to the liability of Amory for restitution in the event of the final success of the defendant, his remedy will not be improved, as the order cannot create a retroactive liability in this respect.

Section 173 relates to amendments. The court is thereby authorized to amend any pleading, process, or proceeding, by adding or striking out the name of a party. An amendment signifies the correction of something which was previously defective. It is not the office of an amendment to introduce new facts or parties, arising or becoming interested after the commencement of the suit. A supplemental complaint or answer is the proper practice in such cases.

The order appealed from should be affirmed, with costs.

Sutherland, J.—I think the judge at chambers had power to grant the defendant's motion; and as he denied it solely on the ground of want of power, I think the order should be reversed, irrespective of the question whether he ought to have granted the motion.

Clerke, J.—The justice at the special term based his decision on the ground that one party in an action cannot compel another person to become his adversary in the action under the Code of Procedure; and that section 121 of the Code does not warrant compulsion of this kind. Neither does the section relating to amendments warrant it. Whether the court has the inherent power to make such an order was not discussed below. The judge did not deem this a proper case, it is to be presumed, for entertaining the question. I concur with Judge Leonard in thinking that the order should be affirmed.

Order affirmed.

MATTER OF EIGHTIETH STREET.

Supreme Court, First District; General Term, March, 1864.

CERTIORARI.*—ASSESSMENT.—FRAUD AND LEGAL IRREGULARITY.

The allowance or refusal of a writ of certiorari to review the proceedings of local public authorities in laying assessments and awarding damages, rests in the sound discretion of the court.

In such cases, the writ should be refused, to avoid public inconvenience, where the relator has other adequate remedy by legal proceedings.†

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* In THE PEOPLE *on rel.* COOK *a.* THE BOARD OF POLICE (*Supreme Court, First District; General Term, February,* 1864), it was *Held,* that under the Laws of 1840, 1844, and 1854, costs are now properly allowed on a common-law certiorari.

Motion to resettle order allowing costs on certiorari.

This was a certiorari, issued on the relation of Stephen L. Cook, directed to the Board of Police of the Metropolitan Police District, to review the conviction of the relator of charges of misconduct as a policeman. Judgment was rendered in favor of the relator, with costs. The decision is reported 16 *Ante,* 473. The respondents moved to resettle the judgment in respect to the award of costs.

Aaron J. Vanderpoel, for the motion, cited Baldwin *a.* Wheaton, 12 *Wend.,* 262; People *on rel.* Harvey *a.* Heath, 20 *How. Pr.,* 304; Caldwell's Case, 13 *Abbotts' Pr*, 405; S. C., *sub nom.* People *a.* Kelly, 35 *Barb.,* 444.

William Henry Arnoux, opposed, cited Laws of 1840, 327, ch. 386; Laws of 1844, 402, ch. 273; Laws of 1854, 592, ch. 270.

BY THE COURT.—BARNARD, J.—At common-law, costs were not allowed upon a certiorari. (People *a.* Duell, 6 *Abbotts' Pr.,* 285; S. C., 16 *How. Pr.,* 43; People *a.* Heath, 20 *Ib.,* 304; People *a.* Kelly, 35 *Barb.,* 444; S. C., *sub nom.* Caldwell's Case, 13 *Abbotts' Pr.,* 405). In 20 How. Pr., the court say, "None is given by any statute to which our attention has been called, in a case like the present. The statutes referred to were the laws of 1854, cited above, and the Code, section 318. It is the duty of counsel to inform the court of the law, and in that case the counsel was properly punished for his lack of diligence in a matter of such personal interest as the law relating to costs. In the case under consideration, the laws of 1840 and 1844 have been brought to our notice, and they clearly and distinctly allow costs on every certiorari. The decision in Wendell (Baldwin *a.* Wheaton, 12 *Wend.,* 262) is inapplicable, because made prior to the passage of those acts. The other decisions must be disregarded, because it appears that the attention of the court had not been directed to the statutes cited above. (*Ram on Legal Judgments,* 121.)

Motion denied.

† This rule is further illustrated in THE MATTER OF TOMPKINS SQUARE (*Supreme Court, Second District; Special Term, August,* 1858), where it was *Held,*—1. That a

The act empowering a justice of the Supreme Court, on petition, to set aside assessments in New York for fraud or legal irregularities in the proceedings relative thereto (*Laws of* 1858, 574, ch. 338), is a remedial statute, and should be liberally construed.

certiorari to review an ordinance directing a local improvement, must be applied for immediately: it should be refused, if the applicants have suffered such delay that the assessment has been made and partly collected and paid over. It was further *Held*,—2. That a remonstrance against proceedings in assessments for a local improvement will not be regarded, if signatures necessary to make out the majority are not made by the parties whose names are used and are not duly authenticated. 3. The common council of a municipal corporation may act upon the petition and the remonstrance in a street case, presented to their predecessors in the preceding year.

In this case, application was made to the court for a certiorari to remove the proceedings of the Common Council in the matter of opening Tompkins Square, in Brooklyn, to the Supreme Court for review; the relators claiming that the proceedings were invalid, on the ground, among others, that a majority of those interested remonstrated against the improvement. Upon the application, the court referred it to L. Birdseye, Esq., to take proof of the question of fact, as to whether a majority did remonstrate against the proposed opening. The referee proceeded to take testimony, and after a hearing, reported that at the time mentioned in the notice of the Common Council for the filing of remonstrances, there were 511 owners within the district of assessment, and that of those, 290 had remonstrated against the measure. Other facts appear in the opinion.

On the coming in of the report, the application was denied, the following reasons being assigned by the court—Strong, J., for the decision:

1. The Common Council could return only the evidence laid before that body and its committees. There was not sufficient evidence that the remonstrance had been actually signed by a majority of the landowners in the district. There were suspicious circumstances in reference to several of the signatures, which authorized a requisition for further proof. If the direct decision of the Common Council upon this question of fact could be reviewed upon a common-law certiorari (which is at least doubtful), there is not enough in the papers to authorize this court to reverse it. If the report of the referee can be taken into consideration upon this question, it appears from that, that but 254 out of 511 names were signed by the parties themselves, or by any of them through an agent under written authority, or by others in their presence. The signatures of guardians for their wards were unauthorized by the statute, as were also those by agents, especially when, as in this case, their authority was not proved before the Common Council or its committee. The remonstrance held the affirmative upon this question, and any defects in their proofs should be visited upon them.

2. It was competent for the Common Council of 1856 to act upon a petition and remonstrance presented to their predecessors in 1855. The case of Coles *v.* Trustees of Williamsburgh (10 *Wend.*, 659) is directly in point, and so decides that question. In Wetmore *a.* Story (22 *Barb.*, 414; S. C., 3 *Abbotts' Pr.*, 262), it was decided that the resolution in question had not been adopted by the two Boards of the same Common Council, and was therefore invalid. It differed from the Williamsburgh case, which was acknowledged to be law.

3. The application for a certiorari in this case is at too late a day. The ordi-

Thus, *it seems* that it entitles a property-owner to relief, where the street commissioner, by fraudulently over-estimating the quantity of rock excavation in grading a street, has awarded the contract for the work to a person apparently, but not truly, the lowest bidder.

nance or resolution of the Common Council, directing the improvement, was adopted in June, 1856. It was competent for those opposed to the measure to apply for a certiorari immediately thereafter. But instead of pursuing that course, they suffered the Common Council to proceed and make the necessary assessments, and out of $64,981.60, $29,046.62 has been collected and paid out for expenses and awards. It would be productive of great inconvenience and expense to arrest the proceedings at this late day. It will be far better that the parties should seek another remedy, which (if they have been wronged) would do justice to them without unnecessary injury to the public. (People *a.* Mayor, &c., of New York, 5 *Barb.*, 43.)

In Husted's Case (*Supreme Court, First District; General Term, November*, 1863), it was *Held*, that a certiorari does not lie to review proceedings in a habeas corpus case, until after a final determination of the case: it does not lie upon an order committing defendant for a false return.

In this case, Amelia A. Husted had procured a habeas corpus to regain from Peter O. Husted the custody of her child.

The defendant made return to the writ of habeas corpus, that the child mentioned in the writ was not in his custody at the time of the issuing of the writ, or at the time of its service, or at any time during that period, and that, therefore, he could not produce her body.

The relator traversed the return, and on a trial of the issue, it was found false, and the court (Clerke, J.) ordered the defendant to be committed and to pay a fine for the contempt.

J. R. Whiting, for the defendant, then applied to the court at general term, for a certiorari to review this determination, which now came on for hearing. (Present, Sutherland, P. J., Leonard and Barnard, JJ.)

Gilbert Dean, opposed, raised the preliminary objection that the order in question was interlocutory and not final, and therefore not now reviewable.

After hearing counsel, the court reserved their decision, and on a following day announced it to be, that, by the statute (3 *Rev. Stat.*, p. 892, § 85), no certiorari shall be issued in habeas corpus cases until a final determination shall have been made by the officer. That the proceeding, as brought before the court, is not reviewable on certiorari until a final adjudication as to the custody of the infant.

The writ of certiorari was therefore quashed.

In Freeman *a.* Ogden (*Supreme Court, First District; General Term, February*, 1864), it was *Held*, that summary proceedings to recover the possession of lands were reviewable by certiorari, and not by appeal.

This was a certiorari to C. W. Van Voorhies, Esq., Justice of the 7th District Court, New York city, to obtain the review of certain proceedings instituted by Jonathan M. Freeman against James W. Ogden, to recover possession of lands, &c.

Certiorari to review proceedings relative to an assessment.

The writ was directed to the Mayor, Aldermen, and Commonalty of the city of New York; the proceedings sought to be reviewed were in relation to an assessment for regulating and grading Eightieth-street, between the Fifth-avenue and the East river, New York city. The street commissioner advertised for proposals for the work, estimating it at 20,000 yards of rock excavation, and 8,000 yards of earth excavation, and calling on the bidder to fix his price per cubic yard. The successful bidder proposed to do the rock excavation for nothing, and the earth excavation at one dollar per cubic yard. The true quantities were, rock 8,886 yards; earth, 33,663 yards. If the work had been awarded to other bidders, it would have cost $11,000. Certain of the property-owners took the present proceeding to set aside the assessment. The court below (Mr. Justice INGRAHAM), after delivering the opinion reported 16 *ante*, 169, made the following order: "The said justice being of the opinion that the petitioners are entitled to the relief for which they apply, and that the proceeding by certiorari is a suitable and appropriate proceeding in and by which to obtain such relief, but that in view of the rule of the court, if in this proceeding such relief is granted, it should be by the decision of the general term:

"Ordered, that the said motion as made at the special term be, and the same is hereby denied, but that the same be transferred to the next general term, and that the said petitioners have leave to bring on the said motion at the general term on the said writ, and the said return thereto, on the papers as submitted at the special term."

Stephen P. Nash, for the respondent, claimed that the New York Common Pleas had exclusive jurisdiction of the review of summary proceedings for the possession of land under sections 34, 351, of the Code, and ch. 193 of Laws of 1849, and that the remedy was by appeal.

George C. Goddard, for the relator, was stopped by the court.

The Court, (LEONARD, P. J., CLERKE and SUTHERLAND, JJ.) *Held*, that these proceedings were reviewable by certiorari, and not by appeal, and the review was properly to be had in the Supreme Court.

After argument, the proceedings before the justice were reversed and restitution ordered.

John E. Parsons, for the relators.—I. The contract was in fraud of their rights. Property-holders are mere passive victims of corporation frauds. The most they can do, though not so required, is to give notice of the fraud: in this case, the city was apprised of it in 1857. The fraud, therefore, vitiates the assessment.

II. The contract, and all proceedings based upon it, were also void, under the charter of 1853, as having been given to the highest instead of the lowest bidder. (Brady *a.* Mayor, &c., of N. Y., 2 *Bosw.*, 173; Aff'd, 20 *N. Y.*, 312.) All the bids were in the prescribed form, with adequate security, corresponding in every respect to the requirements of the ordinance.

III. To save the expense to themselves and the city of numerous suits or proceedings, in which the city would be unsuccessful, parties representing the larger part of the assessment unite in one proceeding, applying for a certiorari.

IV. Certiorari is the appropriate proceeding. 1. No relief can be granted under the act of 1858. (*Laws of* 1858, 574, ch. 338; Miller's case, 12 *Abbotts' Pr.*, 121; Horn's case, *Ib.*, 124.) 2. Nor under the act of 1841. (*Laws of* 1841, 143, ch. 171.) The assessors have no power to consider the validity of an assessment. Their only jurisdiction is to make a just and equitable assessment of the aggregate amount assessed, "among the owners or occupants of all the houses and lots intended to be benefited thereby, in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire." (*Davies' Laws*, 526; Leroy *a.* Mayor, &c., of New York, 20 *Johns.*, 430.) 3. Nor by action: the courts have uniformly refused relief by action, where the record shows the invalidity, on the very ground that the proper remedy was by certiorari. (Heywood *a.* City of Buffalo, 14 *N. Y.* (4 *Kern.*), 534; Betts *a.* City of Williamsburgh, 15 *Barb.*, 255; Bouton *a.* City of Brooklyn, 15 *Barb.*, 375; S. C., 7 *How. Pr.*, 198; Van Doren *a.* Mayor, &c., of N. Y., 9 *Paige*, 388; Mayor, &c., of Brooklyn *a.* Merserole, 26 *Wend.*, 132; Mace *a.* Trustees of Newburgh, 15 *How. Pr.*, 161.)

V. The confirmation of the assessment was a judicial act, in this case exercised without jurisdiction on the part of the city or its board of assessors. The corporation has no power to impose upon property-owners a charge which could not be legally

enforced by the party in whose favor it is imposed. The complainants being numerous, the court will not compel them to individual actions for the recovery of amounts illegally exacted, but having by a single proceeding the matter and all the parties before it, will prevent by its action a multiplicity of suits. (Bouton *a.* City of Brooklyn, 7 *How. Pr.*, 198; S. C., 15 *Barb.*, 375; People *a.* Mayor, &c., of Brooklyn, 9 *Barb.*, 535; Betts *a.* City of Williamsburgh, 15 *Ib.*, 255; Leroy *a.* Mayor, &c., of N. Y., 20 *Johns.*, 430; Starr *a.* Trustees of Rochester, 6 *Wend.*, 565; Wilson *a.* Mayor, &c., of N. Y., 1 *Abbotts' Pr.*, 415.)

VI. An assessment is a proceeding on the part of the corporation, the board of assessors being one of its bureaux. The writ is therefore properly directed to the Mayor, &c. And the record consists not merely of what the assessors may see fit to incorporate in the roll, but of all the proceedings essential to show a valid assessment,—the ordinance, estimate, proposals, bids, award, confirmation, contract, certificate of work done, action of the assessors, &c., &c., and all action of the common council in respect to the proceeding. The record thus made up, in this case, proves the illegality of the assessment. 1. By reason of Slattery not having been the lowest bidder. 2. By reason of his fraudulent complicity with the street commissioner. The circumstances are inconsistent with honest intent, and lead irresistibly to the inference of fraud.

John E. Develin, for the respondent.—I. The writ should be quashed, out of regard to public inconvenience. Rex *a.* Utoxeter, 2 *Strange*, 932; Rex *a.* Justices of Shrewsbury, *Ib.*, 975; Rex *a.* King, 2 *Term.*, 234; Lawton *a.* Commissioners of Cambridge, 2 *Cai.*, 182; People *a.* Supervisors of Alleghany, 15 *Wend.*, 198; Elmendorf *a.* Mayor, &c., of N. Y., 25 *Wend.*, 693; People *a.* Supervisors of Queens, 1 *Hill*, 195; People *a.* Mayor, &c., of N. Y., 2 *Ib.*, 9; Matter of Mt. Morris Square, 2 *Ib.*, 15; Case of Fifty-first-street, 3 *Abbotts' Pr.*, 232; People *a.* City of Rochester, 21 *Barb.*, 656, 664; People *a.* Stilwell, 19 *N. Y.*, 531; Dixon *a.* City of Cincinnati, 14 *Ohio*, 240.)

II. The relators have a remedy in the nature of an appeal; and where a remedy of that character exists, a certiorari will not be granted. (*Laws of* 1841, 143, ch. 171; *Laws of* 1858,

574, ch. 338; *Davies' Laws*, 537, § 182; Matter of Mt. Morris Square, 2 *Hill*, 14, 27; People *a.* Covert, 1 *Ib.*, 674; Storm *a.* Odell, 2 *Wend.*, 287.)

III. The writ is misdirected, and should be quashed for that reason. (*Laws of* 1861, 702, ch. 308, § 1; Bogert *a.* Mayor, &c., of N. Y., 7 *Cow.*, 158.) It was by the board of revision and correction, constituted by the act of 1861, that this assessment was confirmed, and it is to that board that the writ should have been directed. (Bogert *a.* Mayor, &c., of N. Y., 7 *Cow.*, 158.)

IV. The writ removes nothing but the record of the proceedings of the tribunal whose acts are sought to be reviewed, and the only question subject to review is, whether that tribunal has kept within the limits of its jurisdiction. (Birdsall *a.* Phillips, 17 *Wend.*, 464; Allyn *a.* Commissioners of Schodack, 19 *Ib.*, 342; *ex-parte* Mayor of Albany, 23 *Ib.*, 277; Stone *a.* Mayor, &c., of N. Y., 25 *Ib.*, 157, 167; Nichols *a.* Williams, 8 *Cow.*, 13; People *a.* Mayor, &c., of N. Y., 2 *Hill*, 9; People *a.* Overseers of Barton, 6 *How. Pr.*, 25; Haviland *a.* White, 7 *Ib.*, 154; People *a.* City of Rochester, 21 *Barb.*, 656, 665; People *a.* Goodwin, 5 *N. Y.* (1 *Seld.*), 568.) The only matter in the nature of a record contained in the return, is the ordinance authorizing the work, the estimate and assessment made by the persons authorized for that purpose, and the confirmation of the assessment by the board of revision. (People *a.* Mayor, &c., of N. Y., 2 *Hill*, 9.)

V. The objections urged against the assessment are not available to the relators, since they do not affect the jurisdiction of the assessors, or the jurisdiction of the board by whom the assessment was confirmed. (Harman-street, Matter of, 16 *Johns.*, 231; John and Cherry-streets, Matter of, 19 *Wend.*, 659, 671; William and Anthony streets, Matter of, *Ib.*, 678, 695.) The relators having failed to present their objections to the assessors, are estopped from questioning its regularity upon any except jurisdictional grounds. (Miller's Case, 12 *Abbotts' Pr.*, 121; Horn's Case, *Ib.*, 124; Bennett's Case, *Ib.*, 127; Keyser, Matter of, 10 *Ib.*, 481.) The contract forms no part of the assessment proceeding. (Hays' Case, 14 *Abbotts' Pr.*, 53.)

Clerke, J.—I presume that nothing is better settled in this State, than that, in cases like the present, the allowance or re-

fusal of a writ of certiorari rests in the sound discretion of the court. The local public authorities, who are invested with the power of laying assessments and awarding damages, exercise powers in which the people at large are concerned; and as Bronson, J., observes, in People *a.* Supervisors of Alleghany (15 *Wend.*, 198, 206), "Great public inconvenience might result from interfering with their proceedings." Besides, it appears to me that the parties alleged to have been injured in this case had a complete remedy under the act of 1858. This is a remedial statute, and should be liberally construed. It affords a summary remedy to all who have been affected by any fraud or legal irregularity in proceedings relative to any assessments for local improvements in the city of New York. The petition discloses a palpable fraud, concocted and carried out by the contractor and the street commissioner; in short, a positive conspiracy to defraud the petititioners. This is not at all like Miller's case (12 *Abbotts' Pr.*, 121), to which the counsel for the petitioners refers us. The ground of the application in that case was, that a part of the work included in the assessment was constructed without any contract, though it exceeded five hundred dollars. The judge considered that this was an irregularity which did not affect the jurisdiction of the tribunal by which the assessment was imposed, and unless such an objection were raised before confirmation the irregularity was cured. But in this case, as I have said, gross and palpable fraud is alleged, and, if true, the petitioners were clearly entitled to the relief afforded by the act of 1858. There are other objections to this application not necessary now to notice.

The writ should be quashed.

Leonard, J.—It is not satisfactory to examine alleged frauds in fact upon certiorari, where the frauds are to be found by induction, and not by evidence taken on the question—the allowance of the writ being discretionary. I concur in quashing it, without expressing any opinion as to the other remedies.

Sutherland, J.—I concur in Judge Clerke's conclusion.

HOTOP *a.* NEIDIG.

Supreme Court, First District; General Term, March, 1864.

ASSIGNMENT.—FRAUD.—VARIANCE.

Where an assignment for the benefit of creditors provided for a preference to those named "in the annexed schedule," and such schedule was not made till two days after the delivery of the assignment, there being evidence of entire good faith on the part of assignor and assignee,—*Held*, that both the assignment and schedule were valid.

Under a complaint framed to set aside an assignment merely on the ground of fraud, it is not competent for the plaintiff, on a failure to obtain the principal relief, to insist on a judgment settling the construction of the instrument.

Appeal from a judgment.

This action was brought by Gustavus H. Hotop against Heinrich Neidig and Newell Bliss, to set aside an assignment as fraudulent against creditors. It had been tried before Hon. C. P. KIRKLAND, referee. The defendant Bliss made a general assignment to Neidig for the benefit of creditors. The first trust was "to pay the debts of N. Bliss & Co., which are enumerated and described in a schedule thereof hereto annexed, marked schedule B, and all interest moneys due or to grow due thereon."

Bliss, when he executed the assignment, intended that a schedule B should be afterwards annexed to the same, preferring two notes of $2,500, indorsed by one George Gault, which were under discount. The reason stated, on the trial, why the schedule was not annexed when the assignment was executed was, that the conveyancer had not then a precise statement of the amount of the notes, and Bliss wished to execute the assignment at once, and before such statement was procured, because he feared, as the referee found, without legal reason for such fear, that the creditors of N. Bliss & Co. might issue attachments against him, and seize the firm property, in the event of his leaving the State, which he contemplated doing at once. Two or three days after the assignment was executed

and delivered, and possession of the assigned property taken under it, the conveyancer who prepared the assignment prepared a schedule, B, sent it to Bliss, who signed it in the presence of a witness, and then gave it to the assignee, Neidig, requesting him to attach it to the assignment.

Neidig declined to attach the schedule B to the assignment, but it was afterwards attached thereto by Bliss's former partner, and again detached therefrom by Neidig, and kept detached; but Neidig, after suit brought, claimed to act under the assignment, and schedule B as a part of it. The referee found that in the conduct of Bliss, in the premises, there was in fact no fraudulent intent. He found, as matter of law, that the assignment and the schedule B were to be regarded as one instrument, the same as if the schedule had been annexed when the assignment was executed; and that the execution and delivery to the assignee by Bliss of schedule B, several days after the execution and delivery of the assignment, in pursuance of his fixed intention to do so, formed at the time when he executed the assignment, did not invalidate the assignment or make it fraudulent in law, and thus void. The referee, therefore, dismissed the complaint, but without costs. Thereupon judgment was entered up in favor of the defendants, and this appeal taken therefrom.

Kaufman, Frank & Wilcoxson, for the appellant.—I. By the terms of the assignment, and by the evidence of Bliss, it appeared that he executed and delivered the assignment with the intent and purpose, on his part, at the time he executed it, of thereafter making out and annexing thereto a schedule of preferred creditors; and the evidence is clear that some two or three days after the execution and delivery of such assignment, he consummated his preconceived intent and purpose, by making out and signing a schedule of preferred creditors, and delivering it to the assignee as part and parcel of the assignment. The assignment, as between the assignor and assignee, transferred the property irrevocably to the assignee, and the assignor could not modify said assignment subsequently by a schedule of preferred debts, or execute a new assignment. (Porter *a.* Williams, 9 *N. Y.* (5 *Seld.*), 142; Bell *a.* Holford, 1 *Duer*, 58.) The execution of schedule B by the assignor was also nugato-

ry, for the reason that it was not accepted by the assignee, either with the assignment, of which it is now claimed to be a part, or without it. (Peabody *a.* Fenton, 3 *Barb. Ch.*, 451; Crosby *a.* Hillyer, 24 *Wend.*, 280; Moir *a.* Brown, 14 *Barb.*, 39.)

II. The assignment is void as against the plaintiff, because it contained a provision for a schedule of preferred creditors, which the assignor designed to make and have annexed to the assignment after its execution. It was executed, as is shown by the testimony, with the actual intent to hinder and delay creditors. (Averill *a.* Loucks, 6 *Barb.*, 470; Litchfield *a.* Pelton, *Ib.*, 187.)

III. The judgment appealed from declares the assignment a valid assignment, and of the same effect as if the schedule of preferred creditors had been made and annexed thereto at the time the assignment was executed. The judgment should be reversed, and a new trial granted.

Lockwood & Overfield, for the respondents.—I. The findings of fact are abundantly sustained by the evidence. It is not material whether the assignee claimed that the assignment was with preferences or not.

II. As to the exceptions to the findings of law: 1. No reservation of the right to annex a schedule appears on the face of the assignment. 2. No reservation of such right by parol, or intent to make such reservation, is shown. 3. The schedule was omitted by mistake or accident, which a court of equity will remedy.

III. If there were no right to annex the schedule, yet the assignment, no fraud appearing upon its face, or shown in its execution, is valid as an assignment without preferences.

IV. Preferential assignments being legal, the assignment cannot be avoided, even though it were made to escape attachments.

Sutherland, J.—The only question in this case is presented by the exception to the finding of fact, that the said Bliss did not omit to execute and attach the said schedule to the assignment with any view or intent of reserving the opportunity of giving preference to any creditors he might desire to prefer, or to any creditor or person except the said Gault; and to the fur-

ther finding of fact, that there was no intent, in fact, to defraud in the making and delivery of said assignment, nor in the delay in the execution and delivery to the assignee of said schedule B; on the contrary, the whole transaction was in actual and entire good faith.

These findings of fact were abundantly authorized by the evidence, and it cannot be said that the assignment was fraudulent in law, irrespective of the question of fraud in fact as to the plaintiffs, or any other creditor.

The complaint was not properly framed to set aside the assignment on any other ground or principle than fraud, or for the purpose of having it adjudicated that the debts mentioned in schedule B were not entitled to a preference, because schedule B was not annexed to the assignment when the assignment was executed and delivered, and not until a day or two afterwards.

The complaint was framed on the theory that the assignment was fraudulent and void as to the plaintiff, a judgment and execution creditor; and whether it was so or not, appears to have been the only question litigated before the referee.

I think the judgment should be affirmed, with costs.

Leonard and Clerke, JJ., concurred.

HANCOCK *a.* PALMER.

Supreme Court, First District; General Term, March, 1864.

Bills and Notes.—Account Stated.—Defence.—Estoppel.—Counter-claim.

The giving of a negotiable security for a demand does not preclude the debtor from setting up a defence which was in existence when the security was given. *So held*, where the action was upon such subsequent security, and not upon the original demand.

These were two similar actions, by William Hancock and John Foley against Thomas Palmer; the first, brought upon five

bills of exchange drawn by the plaintiffs upon the defendant, and accepted by him; and the other, upon two promissory notes of the defendant, drawn to the order of the plaintiffs, amounting in the whole to $16,856.55.

The defendant answered by way of counter-claim only, and alleged that the defendant was building a railroad, and contracted with the plaintiffs to deliver him the iron rails at Brooklyn, at certain specified times and at a specified place, as appeared by the contract, of which a copy was annexed, and that the bills were accepted and the notes given in payment for said iron; that the plaintiffs did not comply with their contract in many particulars; that they neglected to deliver the iron at the stipulated time and place; and that they did not pay the freight for it, after they had received the money from the defendant for that purpose, thereby obliging him to send for it to Elizabethport, detaining the lighters there and causing him great expense. He alleged damages to the amount of $15,000, and claimed judgment therefor.

The plaintiffs replied to the answers, admitting the contract, but averring due performance, and denying every other allegation of new matter constituting the counter-claim. The contract was made October 8th, and the iron was to be delivered, 100 tons within ten days thereafter, and the balance of 550 tons in lots of 100 tons each, one lot each ten days thereafter. The bills of exchange were given October 24th, November 1st, November 20th, and November 25th, 1861, and the promissory notes were given December 13th and December 21st, 1861. The plaintiffs then moved for judgment upon the pleadings for the amount claimed. The motion was granted by the court, and the defendant excepted.

From the judgments so recovered, defendant appealed.

David Dudley Field, for the appellant.—I. The ruling necessarily implied not merely that the defendant had made no valid defence to the complaint, but that the facts stated in his answers constituted no valid counter-claim, even if they were true. 1. These facts could have been pleaded under the former practice by way of cross-action or of recoupment; and they are in this case well pleaded as a counter-claim. (Graves *a.* Legg, 9 *Exch.*, 717.) 2. By accepting the bills and giving the notes, the de-

fendant waived only his right to refuse to make the payment, stipulated by the contract, on the ground of the plaintiff's failure to deliver the iron at the agreed time and place. (Hasbrouck *a.* Tappen, 15 *Johns.*, 200.) 3. But waiver of the non-performance at the agreed time and place, is not a waiver of the damage which resulted from the default in these respects. (Barber *a.* Rose, 5 *Hill*, 76; Hasbrouck *a.* Tappen, 15 *Johns.*, 200; Allaire *a.* Whitney, 1 *Hill*, 484; 1 *N. Y.* (1 *Comst.*), 305; McKnight *a.* Dunlop, 5 *N. Y.*, 537, 544; Bowman *a.* Teall, 23 *Wend.*, 306.)

II. The court erred in refusing to permit the defendant to prove the facts set forth in his answers. Even if it were conceded that by accepting the bills and giving the notes the defendant waived all damages which he knew had then accrued to him, yet it is obvious that the same principle will not include damages not then apparent. (Mitchell *a.* Wiscotta Land Co., 3 *Clarke* (*Iowa*), 209; Robinson *a.* Brinson, 20 *Texas*, 438.) It was error to refuse to permit proof of damages resulting from the plaintiffs' neglect to pay the freight-money on the iron, after it had been paid to them by the defendant. This was a matter entirely apart from the giving of the bills and notes; and if the acceptances waived any damages, resulting from failure to perform at the agreed time and place, the waiver certainly did not include damages like these, which were entirely independent of, and subsequent to, the making of the acceptances. (Spalding *a.* Vandercook, 2 *Wend.*, 431.)

Charles Matthews, for the respondents.—I. The court was right in directing the jury to find a verdict for the plaintiff upon the pleadings. The freight was to constitute a part of the price of the iron, and was to be paid and deducted before the amount to be paid in cash and in notes could be ascertained. The giving of the notes, in the absence of any averment to the contrary, admits the settlement of the freight and the payment of one-half in cash, as provided for in the contract.

II. Before the answer can be held to constitute a counterclaim for the expenses of lighterage from Elizabethport to Brooklyn, there must be an averment that such expenses were not included in the settlement of the freight, which was necessarily made before the notes were given.

III. The damage for any delay in delivering the iron according to contract, was waived by the giving of the notes. (10 *Barb.*, 376; 7 *Pick.*, 52; 4 *Cow.*, 564.)

IV. The other claims for damages are too remote and contingent. (14 *Wend.*, 219; 7 *Hill*, 61; 16 *N. Y.*, 489; *Sedgwick on Dam.*, 301, 302; *Parsons on Cont.*, 461.)

V. The acceptance of goods without objection at a place other than that stipulated in the contract, is a waiver of the place of delivery. So, also, when goods are to be delivered within a certain time, the acceptance of the same after that time, and paying therefor, is a waiver of any damage which the party may have sustained. (1 *Story on Cont.*, § 32, *a.*)

Peckham, J.—The action was upon certain acceptances of the defendant. The defendant set up that the acceptances were given on account of certain railroad iron which the plaintiffs had agreed to deliver "on the wharf in Brooklyn" at certain times, pursuant to a contract to that effect. That by the contract, a copy whereof is set forth in the answer, the plaintiffs were to deliver said iron, "the first hundred tons in ten days from that date, and the balance in one hundred ton lots at intervals of ten days." The answer avers that the plaintiffs never, in any instance, delivered any of said iron at Brooklyn, but delivered it at Elizabethport, New Jersey, against the wishes and without the consent of the defendant, and thereby obliged the defendant to send for it, to his great loss and expense. This is the substance of the defence set up in the answer. There may be some informality in its statement, but it is sufficiently stated to apprize the plaintiffs of the defence intended.

I incline to think that the defendant was at liberty to prove this defence, and that the giving of the notes did not necessarily and conclusively waive it. (Barber *a.* Rose, 5 *Hill*, 76; Allaire *a.* Whitney, 1 *Ib.*, 484; McKnight *a.* Dunlop, 5 *N. Y.* (1 *Seld.*), 537, 544; Bowman *a.* Teall, 23 *Wend.*, 306.)

The answer avers that the iron was delivered there without the defendant's consent, to his great damage. This may be proved to be true, though the transaction, as presented by the giving of the notes after the delivery, looks strongly the other way.

Judgment reversed.

Clerke, J.—Even partial payment does not estop a party from setting up his defence to the demand. *A fortiori*, the giving of a bill of exchange, or the acceptance of it, cannot have that effect. (See Lounsbury *a.* Depew, 28 *Barb.*, 44.)

Sutherland, J., concurred.

Judgment reversed, and new trial ordered.

GOINGS *a.* PATTEN.

New York Common Pleas; General Term, July, 1863.

Account.—Bill of Particulars.

A defendant relying on an account stated, if he fails to prove that it was mutually adjusted, and the balance ascertained, may fall back upon the accounts and prove that there is, in fact, a balance due him, unless his pleading is so framed as to show that he relies solely on the account stated.

A pleader, claiming on an account stated, who refuses to furnish the items of his demand, pursuant to section 158 of the Code of Procedure, should be precluded from giving evidence of such items further than may be necessary to prove the settlement of the sum due.

The refusal of the court to allow a party to serve a bill of particulars after his time to do so has expired, is not reviewable on appeal.

Appeal from an order precluding defendants from giving evidence of the items of an account.

This action was by Charles Goings against Ludlow Patten and Alexander S. Clark. The answer set up certain payments, and a counter-claim upon an account, the items of which were not given: the plaintiffs demanded a bill of particulars, which was refused, whereupon the following order was made: "That the defendants, on the trial of this action, be and they are hereby precluded from giving any evidence of the account and the items thereof, stated and mentioned in the answer of the defendants served in this action, except only so far as may be necessary to establish the single defence of account stated and

settled between the parties, it being alleged on this motion that that is the only defence sought to be interposed in this action, and set up by the defendants' answer." From this order the defendants appealed.

Jasper W. Gilbert, for the appellants.—I. The court should have determined whether the answer alleged an account under section 158 of the Code. If it did, time to furnish items should have been allowed on terms: if it did not, the order is erroneous. The argument of counsel should not have the effect of an estoppel.

II. The order may be construed so as to preclude the defendants from proving the payments alleged in the answer.

Dewitt C. Brown, for the respondent.—I. The answer alleged an account, within the meaning of section 158 of the Code. The refusal to furnish a bill of particulars justified the order. (Kellogg *a.* Paine, 8 *How. Pr.*, 329; *Code*, § 158.)

II. Defendants' counsel should be held to his interpretation of his own pleading.

III. The order was entirely discretionary with the judge below. He has power to order that a bill of particulars be furnished in all cases.

Daly, F. J.—The appellant insists that the judge should have decided whether this was or was not an averment of an account under the 158th section of the Code: that if it were not, the plaintiff's motion should have been denied; and that if it were, the defendants should have been allowed time to furnish items upon terms. I do not see that this necessarily follows. A party may fail to establish the stating of an account, but that does not cut him off from any defence he may have upon the unsettled account. The two defences are not inconsistent. "The statement of an account," says an old case (Drue *a.* Thorne, *Alleyn*), "doth not alter the nature of the debt; it only reduceth it to a certainty." It admits the existence of a prior running account; and because a party relies upon the defence, that it was mutually adjusted, and the balance ascertained and fixed, and fails to prove it, he is not thereby precluded from falling back upon the accounts, and showing that there is,

in fact, a claim or balance due to him. He would undoubtedly be precluded from doing so if his pleading were so framed as to show that he relied solely upon the defence of an account stated, for, that being made the sole issue, the other party might come unprepared to try any other. But a party might always join with an account stated a count for the original debt; and if he failed upon the one, he might recover upon the other. (1 *Saund. on Pl. and Ev.*, 42.) In the present case, the judge appears to have regarded the defendants' answer as entitling them to prove an account stated, which raises an implied promise to pay the sum found, upon the mutual adjustment, to be due; or, failing in that, to show the existence of a mutual account, and an indebtedness to them arising under it. It would have been entirely consistent with the defence of an account stated, for the defendants to have furnished a copy of the account upon which they meant to rely in the event of their failing to prove the stating of an account. They elected not to do so, and so cut themselves off from the right of giving any evidence to that effect, and limited themselves upon the trial to the proof of an account stated. The defendants having failed to deliver a copy of the account within the time which the Code allows after demand made, the plaintiff was entitled to an order precluding them from giving evidence of it.

It does not appear that the defendants asked for liberty to delivery a copy of their account then, upon terms; but if they had, and the judge had refused, it was a matter entirely in his discretion, which could not be reviewed upon appeal. The clause in the order that it should not be construed as precluding them from establishing the defence of an account stated, was unobjectionable. It prevented the possibility of any misconstruction upon the trial as to the meaning of the order. As the defendants had precluded themselves from setting up any other defence, they could in no way be affected injuriously by it.

The order at special term should be affirmed.

Hilton and Brady, JJ., concurred.

COOPER *a.* NEWLAND.

Supreme Court, Seventh District; General Term, Sept., 1863.

FINDING OF REFEREE.—ASSIGNMENT OF MORTGAGE.—RECITAL IN MORTGAGE.

The finding of a referee, that a bond was executed with the mortgage, which is proved only by the recital in the mortgage, is conclusive as to the execution of the bond.

Where a mortgage is given to secure payment of a bond, an assignee suing to foreclose the mortgage must show an assignment to him of the bond, as well as of the mortgage.

It is well settled that a mortgage passes by an assignment of the bond to which it is collateral, on the ground that the incident follows the principal debt; but the bond does not pass by an assignment of the mortgage.

The assignment of the mortgage without the bond, in such a case, is a nullity.

The mortgage interest, as distinct from the debt created by the bond, has no determinate value, and is not a fit subject for an assignment.

Appeal from a judgment.

This action was commenced by the plaintiff for the foreclosure of a mortgage alleged to have been executed, together with a bond accompanying the same, by the defendant, F. M. King, to C. P. King, and by the latter assigned to Ira Miltimore, and by him assigned to Jeremiah Blood as collateral security for the payment of two notes, which are claimed by defendants to be usurious, one of the notes securing 20 per cent. interest, and the other 12 per cent. These notes were executed in Wisconsin. The answer denies every thing set forth in the complaint except the making of the mortgage, and claims that the assignment from Miltimore to Blood, being based upon usurious considerations, was void; and if valid, that these notes were barred by the Statute of Limitations, and, no suit having been commenced on the notes against Miltimore, the plaintiff has no right to enforce their payment against the defendants. The issues were referred to George Rathbone, Esq., referee, who made a report in favor of the plaintiff, directing a sale of the mortgaged premises, and holding the defendant, F. M. King, liable for any de-

ficiency on the sale. Other facts are stated in the opinion of the court.

From the judgment entered on this report the defendants appealed to the general term.

Finlay M. King and *Charles Andrews*, for the appellants.

William C. Rowley, for the respondents.

By the Court.*—James C. Smith, J.—The finding of the referee, that the defendant executed a bond in connection with the mortgage which is sought to be foreclosed in this action, is sustained by the recital to that effect in the mortgage, and his decision of the question is conclusive.

But the objection that there is no evidence that the bond was assigned by the obligee to Miltimore, or by Miltimore to Blood, presents a more serious question. The complaint alleges that the bond and mortgage in suit were executed by the defendant King to Chauncey P. King; that they were assigned by him to Miltimore, and by Miltimore to Jeremiah Blood, and were left as a part of Blood's estate, at his death; and the plaintiff claims to derive title to them, partly as his widow and legatee, and partly by purchase from his children, who were the other legatees, and under certain proceedings of the Probate Court in Wisconsin. These allegations are denied in the answer. The plaintiff testified, as a witness in her own behalf, that the mortgage was assigned by Chauncey King to Miltimore, and again by Miltimore to Blood; that each of said assignments was in writing, on the back of the mortgage, and that the mortgage was lost. She did not testify that the bond was assigned. She also put in evidence a copy of the record of the assignment from Miltimore to Blood. The assignment purports to transfer the mortgage, but no bond. The assignment from Miltimore to Blood was not absolute, but as collateral security for the payment of two certain promissory notes, made by Miltimore, and which were held by Blood. There is no evidence that the bond was ever in the possession of Miltimore or Blood: on the contrary, the plaintiff, who testified that

* Present, E. D. Smith, T. A. Johnson, and J. C. Smith, JJ.

the mortgage and the Miltimore notes were among the papers left by her former husband, Blood, at his death in August, 1851, and that they were in the hands of his administrator or herself until they were lost in October, 1856, stated that she had no recollection of a bond. Upon this state of the evidence, I see no ground upon which to sustain the finding of the referee, that the bond, as well as the mortgage, was assigned to Miltimore, and by him to Blood. It is well settled that a mortgage passes by an assignment of the bond to which it is collateral, on the ground that the incident follows the principal debt, but the bond does not pass by an assignment of the mortgage. "The incident shall pass by the grant of the principal, but not the principal by the grant of the incident. *Accessesorium non ducit, sed sequitur principale.*" (*Broom's Leg. Maxims*, 360; Jackson *a.* Willard, 4 *Johns.*, 43; Wilson *a.* Troupe, 2 *Cow.*, 196; Jackson *a.* Blodgett, 5 *Ib.*, 202; Langdon *a.* Buell, 9 *Wend.*, 80.) As the plaintiff was not the owner of the bond, the referee erred in deciding that she was entitled to judgment against the defendant King for a deficiency.

But the consequences of the want of an assignment of the bond do not stop here. The assignment of the mortgage without the bond, is a nullity. This is the case at law and in equity, and for good reasons. The mortgage, before foreclosure, is but an incident attached to the debt, which cannot be separated from its principal. The mortgage interest, as distinct from the debt, has no determinate value, and is not a fit subject for assignment. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond. The control over the mortgaged premises must essentially reside in him who holds the debt. "It would be absurd in principle, and oppressive in practice, for the debt and mortgage to be separated and placed in different and independent hands."

This language of Chief-justice Kent, in the case of Jackson *a.* Willard (4 *Johns.*, 43), was adopted by Justice SUTHERLAND in Jackson *a.* Blodgett (5 *Cow.*, 206), and is fully sustained by other authorities. (Jackson *a.* Bronson, 19 *Johns.*, 325; Wilson *a.* Troupe (*supra*); *Powell on Mort.*, 1115, 1116; Agmer *a.* Bill, 5 *Johns. Ch.*, 590; Langdon *a.* Buell, *supra.*) In the case last cited, SUTHERLAND, J., said: "The mortgage cannot exist as an independent debt. If, by especial agreement, it does not ac-

company the security assigned, it is *ipso facto* extinguished, and ceases to be a subsisting demand." It follows, that the conclusion of the referee, that the plaintiff is entitled to a decree of foreclosure of the mortgage, is also erroneous.

These views render it unnecessary to consider the other questions discussed on the argument, and lead to a reversal of the judgment.

The judgment should be reversed, the report of the referee set aside, and a new trial ordered.

Criticised 69 N.Y. 374, 3

THE PEOPLE *a.* MONNAIS.

Supreme Court, First District; General Term, March, 1864.

CERTIORARI. — RETURN. — RAPE. — UTMOST RELUCTANCE. — REQUEST TO CHARGE.—ACTS OF ACCOMPLICE.—ORDER OF PROOF.

A certiorari issued under 2 Rev. Stat., 736, § 27, which requires the district attorney to sue out the writ when judgment shall have been stayed upon any indictment, brings up the indictment as well as the exceptions.

Evidence of acts and declarations by an accomplice, in the absence of the principal, is properly received, if followed by evidence of complicity sufficient to be submitted to the jury.

So held, on the trial of a prisoner for a rape, for which he had been indicted jointly with the accomplice.

A prisoner tried for rape is not, in all cases, entitled to a direction from the court that he cannot be convicted unless the prosecutrix used the utmost reluctance in respect to the commission of the offence. The request should be qualified, so as to include the circumstances under which the offence was committed, such as threats, intimidation, or fears of the prosecutrix.

Where, on the trial of an indictment, evidence of the acts and declarations of a third party had been admitted against the prisoner, with proof of complicity on his part sufficient to be submitted to the jury,—*Held*, that the prisoner was entitled to an instruction from the court that he could not be held accountable for the conduct of the third party, except so far as their acts were in complicity.

Certiorari to the Court of General Sessions.

The prisoner, Jacques Monnais, was convicted, in September, 1863, of a rape upon the person of one Margaret Lyons. The

prisoner was indicted, together with one Mluer, in favor ot whom, before the trial, a *nolle prosequi* was entered. At the trial, the prisoner's counsel had requested the court to charge, "That the jury cannot convict the defendant, unless they are satisfied, from the evidence, that the utmost reluctance was used by the prosecutrix to prevent the commission of the offence." The court refused so to charge, and an exception was taken. An exception was also taken to a refusal to charge as follows: "That the prisoner cannot be held accountable for the conduct of this man, jointly indicted with him, Brown or Mluer, independent of any complicity between that Brown and the defendant, that was drawn into the case." Exception had already been taken to the admission of evidence of Mleur's acts and declarations during the absence of the prisoner. The testimony of the prosecutrix was substantially that Mluer decoyed and forced her into a house of prostitution kept by Monnais, had carnal knowledge of her against her will; that subsequently, by restraint of her liberty, force, and threats of taking her life, and drawing a knife, the prisoner overpowered her resistance to him. The return to the writ of certiorari did not set out, or profess to set out, the indictment in full, although it was averred, by the return, that an indictment was found, and a paper, consisting of a portion of an indictment, was returned with the usual indorsement, "A true bill, &c.," and the record of a plea "Not guilty."

J. Kennedy Furlong and *Edmond Blankman*, for the prisoner.—I. The paper returned to this court as the "indictment," is no indictment at all; it nowhere appears that the accusation, for we cannot style "this paper" an indictment, ever originated in a grand-jury room; it nowhere states the style of the court, the time nor the place of its meeting, nor the time nor place where the "accusation" was found, nor that it was found by any grand-jurors. These omissions are matters of substance, and fatal (McClure *a.* State, 1 *Yerg. Tenn. R.*, 260; Reeves *a.* The State, 20 *Ala.*, 33; *Wharton's Cr. L.*, 4th ed., §§ 219, 220, 222); and particularly when they appear upon a return to a writ of certiorari, coming from an inferior to a superior court. (People *a.* Guernsey, 3 *Johns. Cas.*, 265; 1 *Saund.*, 309; 2 *Hale*, 165; *Bac. Ab.*, *Indictment.*)

II. The judge erred in allowing the prosecution, on the trial of this cause, to give the declarations and acts of Mluer, made in the absence of Monnais, in evidence against the defendant Monnais, because no proof had been given to establish any agency or combination between Mluer and the prisoner. (11 *East.*, 585; 1 *Phillips' Ev.*, 205.) The common design must be first shown. (People *a.* Parish, 4 *Den.*, 153; Williamson *a.* The Commonwealth, 4 *Gratt.*, 547; The State *a.* Simons, 4 *Strobh.*, 266; Regina *a.* Mears, 1 *Eng. L. and Eq.*, 581; Hardy's Case, 24 *How. St. Tr.*, 704.)

III. The learned judge erred in refusing to charge, as requested by the prisoner, in regard to the reluctance used by the prosecutrix to prevent the commission of the offence. (People *a.* Morrison, 1 *Park. Cr. R.*, 644; People *a.* Abbott, 19 *Wend.*, 192.)

A. Oakey Hall, for the people.—Nothing appertaining to the record can be argued at bar, because the case is here on bill, with a stay, and under writ of certiorari. Therefore, only exceptions to evidence and to charge can be argued. If the indictment is wrong, no point of its incorrectness can now be made, because not taken upon the trial, and not apparent in bill of exceptions; neither can matter affecting the verdict, because all these will arise, should a writ of error be hereafter brought, and after judgment has been given, and after the record has been made up. The judge properly refused to charge as firstly requested. 1. The request was limited by the word "utmost." 2. Counsel take the risk of the verbiage of their requests. If defective in part, a request is wholly defective. 3. How much reluctance is to be used by a girl during rape depends upon the circumstances of each case. In this case, prisoner threatened her life with a knife. She was in his own house. The windows were barred. Yet prisoner asks the judge, as an abstract proposition, isolating it from specific facts, to charge that she should have "used" the "utmost" reluctance. 4. The judge had charged in these words: "The simple question that you are to determine is, whether this man forced this girl against her will."

Leonard, J.—This case comes before the general term on certiorari to the Court of Sessions, prosecuted by the district attorney under the provisions of the statute. (2 *Rev. Stat.*, 736.)

The certiorari brings up the indictment as well as the bill of exceptions. (§ 27.)

On referring to the record in this court, attached to the return from the Court of Sessions, the indictment appears to have been found by the grand-jury, and the objection urged by the defendant's counsel in that respect is not founded in fact.

Exceptions were taken at the trial to the admission of evidence respecting the acts and declarations of Mluer or Brown, when Monnais was not present. Mluer or Brown had been indicted jointly with Monnais, but a *nolle prosequi* had been entered as to him before the trial of Monnais.

There was sufficient evidence, before the case was submitted to the jury, to warrant the conclusion that the two were acting in combination when the offence was committed. The objection related only to the order of proof. The admission of the evidence objected to appears to have been fully warranted.

The counsel for the defendant requested the judge to charge the jury, in substance, that the prisoner could not be convicted unless they were satisfied that the prosecutrix had used the utmost reluctance in respect to the commission of the offence.

The "utmost reluctance" would require resistance while life or the power to act remained. The request makes no allowance for threats or intimidation used by the prisoner, or for the fears by which the prosecutrix may have been overcome. The request should have been qualified, so as to include the circumstances under which the alleged offence was committed.

The request, in the form it was put, was unauthorized.

The language of Judge Harris, in the case of The People *a.* Morrison (1 *Park. Cr. R.*, 644), so much relied on by the defendant's counsel, is very natural and appropriate in the connection where it occurs, and would not probably be generally misunderstood. It is not sufficiently precise, however, for a charge to a jury without some modification.

The judge, in the case before us, had previously instructed the jury, very properly, that the question for them was, whether the defendant forced the prosecutrix against her will.

Counsel for the defendant also requested the judge to charge the jury that "the prisoner cannot be held accountable for the conduct of the man jointly indicted with him, Brown or Mluer, independent of any complicity between that Brown and the de-

fendant that was drawn into the case." The language of the request is exceedingly obscure, but I understand it to be, in substance, that the prisoner cannot be held accountable for the conduct of Brown or Mluer, except so far as their acts were in complicity.

There can be no good reason, that I can discover, for refusing to charge substantially as the counsel for the defendant here requested.

All the evidence tended to show that the two were acting in concert, and I am unable to see any evidence from which the jury could arrive at a contrary conclusion. It is not the duty of the judge, however, to assume that the acts of the two were in complicity. The fact was within the province of the jury, and I think it was error to withdraw it from them, as he in effect did by refusing to charge as requested. For this reason, I am in favor of setting aside the verdict and directing a new trial at the Sessions.

Clerke, J., concurred.

Sutherland, J.—I dissent from the conclusion at which Judge Leonard has arrived. The last request to charge is so obscure, that I do not know what the prisoner's counsel meant by it. I do not know what he meant by the words, "independent of any complicity between that Brown and the defendant which was drawn into the case."

New trial granted.

BARTH *a.* BURT.

Supreme Court, First District; General Term, March, 1864.

Former Adjudication.—Set-off.—Record of Judgment.—Matter in Controversy.

A purchaser of goods is not precluded from maintaining an action for a breach of warranty in regard to them, by the fact that he has suffered judgment by default in an action brought to recover the price.

A former judgment is a bar, not to all claims which might have been litigated

therein, but only as to such matters as might have been litigated under the pleadings and issues as made.

Exceptions heard at general term in the first instance.

This action was brought by Charles Barth against George Burt, to recover $165 damages for a breach of warranty in the sale of certain hogs. The case below was tried before Mr. Justice Clerke and a jury.

The plaintiff's counsel proceeded to open the case, and in the course of such opening stated that an action had theretofore been brought in this court by defendant Burt, against the plaintiff Barth, for the price of the hogs mentioned in the complaint, in which action this plaintiff had appeared and offered to suffer judgment to be taken against him for the price of the hogs, less the amount one hundred and sixty dollars claimed in this action as damages for the breach of warranty in the complaint herein alleged, and that such offer having been refused, he had, under the advice of counsel that it would cost more to defend that action in Wyoming county, where the venue was laid and the same was triable, than the amount of damages claimed, suffered judgment to be taken against him for the full price of the hogs, of which judgment the plaintiff's counsel then had before him a duly exemplified copy.

On the opening, defendant moved for a dismissal of the complaint; and the copy of the judgment-roll having been read in evidence by consent, the court dismissed the complaint, directing plaintiff's exception to be heard at the general term in the first instance.

Chauncey Shaffer, for the plaintiff.—I. A defendant is not bound, when sued in any of the superior courts of record, to set up, by way of counter-claim, any demand that he may have against the plaintiff. He may, at his option, prosecute a cross-action for such demand. (Welch *a.* Hazelton, 14 *How. Pr.*, 97; Halsey *a.* Carter, 1 *Duer*, 667; Fabricotti *a.* Launitz, 3 *Sandf.*, 743; S. C., 1 *Code R., N. S.*, 121; Hammond *a.* Baker, *Ib.*, 105; Farmers' Loan & Trust Co. *a.* Hunt, *Ib.*, 1; *Code*, § 150; Batterman *a.* Pierce, 3 *Hill*, 171.)

II. The plaintiff having duly offered to prove his whole case, the dismissal of the complaint was error.

Clarkson N. Potter, for the defendant.—I. The record of the former recovery estops the defendant from controverting that the plaintiff therein fully performed the contract. (Davis *a.* Talcott, 12 *N. Y.* (2 *Kern.*), 184.) That record asserts, that on the 19th of April, 1856, $300 remained due from Barth to Burt on account of the hogs in question. If the plaintiff here succeeds, we shall have a judgment establishing that, by reason of the inferiority of the hogs, $300 was not then due from Barth to Burt.

II. That Barth, the defendant in the first suit, did not defend, makes no difference. The necessity of introducing evidence to support the Burt claim, was superseded by Barth's default. (Davis *a.* Talcott, 12 *N. Y.* (2 *Kern.*), 184.)

III. Matter which would have been a defence to a former action, cannot be made the subject of a subsequent suit. (Canfield *a.* Monger, 12 *Johns.*, 347; Morris *a.* Floyd, 5 *Barb.*, 130; Norton *a.* Woods, 22 *Wend.*, 520.) The defence of breach of warranty is admitted to avoid circuity of action. A second litigation of the same matter should not be tolerated when a fair opportunity can be afforded by the first to do final and complete justice to the parties. (McAllister *a.* Reab, 4 *Wend.*, 482, 492; affirmed, 8 *Ib.*, 109; Fisher *a.* Samuda, 1 *Campb.*, 190.) The judgment of a court possessing jurisdiction is final, not only as to the subject-matter determined, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided. (Embury *a.* Conner, 3 *N. Y.* (3 *Comst.*), 511, 522; Farrington *a.* Payne, 15 *Johns.*, 431; Smith *a.* Jones, *Ib.*, 229; Miller *a.* Covert, 1 *Wend.*, 487.) And the plaintiff's opening showed, not only that Barth might have litigated the quality of these hogs in the former suit, but that he declined to do so solely because it was inconvenient. That he was badly advised is no reason why a salutary rule of law should be bent to meet the supposed equity of his case. (Davis *a.* Talcott, 12 *N. Y.* (2 *Kern.*), 184.)

By the Court.—Leonard, J.—This case comes before us on exceptions taken at the trial, and there directed by the justice to be heard at the general term in the first instance.

The action was brought to recover for a breach of warranty, as to the quality of hogs sold by the defendant to the plaintiff.

The defendant put in issue every allegation of the complaint, but no new matter of defence was interposed by the answer.

At the trial, the defendant was permitted to introduce in evidence the record of a judgment in this court in favor of the defendant Burt against Barth, the plaintiff in this action, for $300, being the balance due to Burt on a sale of 160 hogs by him to Barth. This judgment was recovered by default for want of an answer, and the damages were assessed by the clerk of Wyoming county, where the venue was laid.

No question was made on behalf of Barth at the trial of the present action, that the recovery of the said judgment was not had for the same hogs as to which the breach of warranty is here alleged, and no objection was made to the admission in evidence of the record of the former judgment.

The plaintiff offered to prove the truth of every allegation contained in his complaint in this action, but the learned justice excluded the evidence, and dismissed the complaint, to which ruling the plaintiff duly excepted.

It is insisted, on the part of the defendant Burt in this action, that the recovery of the judgment against Barth in the former action is a bar to the present action, and that Barth was required by law to interpose the breach of the alleged warranty as a defence, recoupment, or counter-claim in that action, or be precluded from any claim or action in relation to it;—that the record of the former recovery estops the defendant in that action (Barth) from controverting that the plaintiff therein (Burt) fully performed his contract;—that matter, which would have been a defence to a former action, cannot be made the subject of a subsequent suit.

There is no doubt that Barth might have interposed the breach of warranty as a defence to the action of Burt, as a recoupment or counter-claim; but the question here is, was it necessary for him to do so, or be forever precluded from a recovery for his alleged damages for the breach of warranty.

The examination which I have given to this subject, leads me to the conclusion, that this inquiry must be answered in the negative.

I will shortly refer to some of the cases most relied on by the learned counsel for the defendant to establish the rule adopted at the trial of this action.

The case of Davis *a.* Talcott (12 *N. Y.* (2 *Kern.*), 184) decides, that where the non-performance of an agreement is interposed as a defence to an action, and it so appears from the record, the defendant in that action cannot maintain an action subsequently for the breach of the same agreement. That case also decides, that where the facts constituting a non-performance of an agreement are set up as a ground for recoupment or set-off, and it so appears from the judgment-record in the former action, parol evidence is inadmissible in a subsequent action, brought by the defendant in the first action, to recover for the non-performance of the same agreement, to establish that the recoupment was withdrawn at the trial in the former action, and the evidence of non-performance confined to resisting a recovery in the former action.

The record in the former action established, by higher evidence, a different state of facts from those proposed to be proven by parol in the second action, and tended also to impeach the verity of the record.

The case of Morris *a.* Floyd (5 *Barb.*, 130,) was decided on the same principle. There it appeared that a mortgagor had been sued on his bond, and interposed a defence by plea, but afterwards suffered judgment to be recovered against him by default at the circuit, where an inquest was taken. In a subsequent action to foreclose the mortgage, the mortgagor set up the same defence. The court held the former judgment to be final. "It is enough that he had an opportunity of trying the question, and that the matter has been adjudged against him."

In Norton *a.* Woods (22 *Wend.*, 520), it is decided that where a party neglects to avail himself of his defence at law, he cannot afterwards obtain relief in equity on the same facts which he might have set up as a defence at law." That is all, there decided, which has any bearing upon the case before us.

The case of Canfield *a.* Monger (12 *Johns.*, 347) arose in a justice's court, and came before the late Supreme Court on certiorari. The remark of the court in that case had reference to the statute then in force relating to set-offs in a justice's court, making it necessary for the defendant in an action to plead his set-off, if he had one, or be forever precluded from maintaining an action to recover it. The case has no application here.

In McAllister *a.* Reab (4 *Wend.*, 482), affirmed in the Court

of Errors (8 *Ib.*, 109), the judge at the trial excluded evidence offered under a plea of a breach of warranty on the sale of an article for the price of which the plaintiff sought to recover. This was held to be error. Justice Marcy, delivering the opinion of the court, uses this language, viz.: "A second litigation of the same matter should not be tolerated, when a fair opportunity can be afforded by the first to do final and complete justice to the parties," &c. This language is cited by the defendant's counsel, and is to be found on his points, as authority to sustain the affirmative of the question above propounded. It is appropriate language in a case where the defence has been pleaded, but has no application in the case before us, where no plea or answer was interposed in the former action. These cases are all distinguishable from the present.

Other cases are cited by the defendant's counsel, which hold, that so far as the subject-matter in controversy has been adjudicated upon, the parties are concluded by it. Also, that a judgment of a court of competent jurisdiction is final as to every matter which the parties might have litigated in the cause. A reference to those cases will show that the "matter in controversy" had been put at issue by the pleadings, or the situation of the question or proceeding before the court, and that they have no application to a case where the "matter in controversy" was not before the court, so as to entitle the defendant to offer evidence of a matter of recoupment, set-off, or counter-claim. A former judgment is a bar, not to all claims that might have been litigated therein, but only to such claims or matters as might have been litigated under the pleadings and issues as made. (Burdick *a.* Post, 12 *Barb.*, 168.) I think it entirely clear, upon authority, that the defendant has the election whether he will set up his claim in answer to the plaintiff's demand, or resort to a cross-action. Such is declared to be the rule by Judge Bronson, in Batterman *a.* Pierce (3 *Hill*, 171). In that case, the warranty was set up as a defence to an action on a promissory note, and the evidence to support it was excluded. The facts of that case are not, therefore, strictly analogous to the one now under consideration, but the dicta of so eminent a jurist is not without force as legal authority.

The New York Superior Court compelled the defendant to elect between an action which he had previously brought for

damages for the breach of a contract, and a claim to recoup in an action against him to recover on a promissory note given for the price of marble sold under the contract in question. (Fabricotti *a.* Launitz, 3 *Sandf.*, 743.) The same court also held that the defendant had the right to elect whether he would recoup, or set-off his damages, or bring a separate action: that such had always been the rule, and the Code had not effected any change in that respect. (Halsey *a.* Carter, 1 *Duer*, 667.) To the same purport is also the case of Lignot *a.* Redding (4 *E. D. Smith*, 285.) (Opinion by Ingraham, first judge.)

The cases referred to sufficiently show that the right of the plaintiff to recover in this action has not been barred by the recovery in the former action of the defendant.

There must be a new trial, with costs to abide the event.

Clerke, J., concurred.

Sutherland, J.—When a defendant, before the Code, set up a counter-claim by way of recoupment, he could not have a balance certified in his favor; and as there might be cases in which the damages he had sustained by fraud or breach of warranty in the purchase of goods exceeded the plaintiff's claim for their price, if the courts had denied the defendant the election, either to recoup or to bring a cross-action for such damages, the defendant in such case would have been without any remedy for such balance or excess of damages beyond the plaintiff's claim; for to have allowed the defendant to have recouped to the extent of the plaintiff's claim, and then to bring an action for such balance, would have interfered with the decisions holding that parties could not split up their claims.

I do not think, therefore, that the cases referred to, in which it is said that the defendant had this election, either to recoup or bring an action, should be considered as controlling on the question in this case.

But prior to the Code, under the statutes allowing a set-off, and under the Code allowing a counter-claim, the defendant can have judgment for any balance found in his favor; and yet I find no case holding that, under the statutes of set-off, the defendant was bound in an action in a court of record to plead or

give notice of his set-off, or be precluded from bringing an action.

In the absence of any such decision, I concur in the conclusion to which Justice Leonard has arrived in this case. (See, also, Halsey *a.* Carter, 1 *Duer*, 667; Welsh *a.* Hazelton, 14 *How. Pr.*, 97.)

The estoppel in Davis *a.* Talcott (12 *N. Y.* (2 *Kern.*) 184), appears to have been put on the ground that the recovery of the plaintiff in the former action, from the nature of the agreement upon which that action was brought, involved the consideration of the claim on which the second action was brought, irrespective of the fact that the claim was set up as a counter-claim in the first action. I do not think this principle of estoppel applicable to the present case.

Whether a defendant, after properly setting up in his answer a counter-claim, can afterwards, and during the pendency of the action in which he has set it up, and in which it may be allowed, bring an action on the claim thus set up as a counter-claim, is another question, and one on which I have expressed an opinion in another case decided at this term.

New trial ordered.

WALSH *a.* THE SUN MUTUAL INSURANCE COMPANY.

New York Superior Court; Special Term, March, 1864

STRUCK JURY.

The court will not order a struck jury in an action on a policy of marine insurance, where the allegation that the grounds of defence are intricate and difficult, is only substantiated by showing that the defence turns on the unseaworthiness of the vessel at the time she sailed, and on the fact that the master was chargeable with a want of competency and seamanship in not making a near port of distress at the time when the water is alleged to have been gaining upon and disabling his vessel, and which he might and ought to have done in season to prevent her loss.

The cases in which struck juries have been allowed, reviewed.

Motion by the defendant upon affidavits and order, to show

cause why a special jury should not be struck for the trial of this cause. The facts upon which the application was based appear in the opinion.

James T. Brady, for the motion, relied on 2 Laws of 1857 (114, ch. 530); Foster *a.* Steele (3 *Bing., N.S.*, 892; 5 *Durnf. & E.*, 460; Anonymous, 1 *Salk.*, 405); Livingston *a.* Smith (1 *Johns.*, 141); Spencer *a.* Sampson (1 *Cai.*, 498).

Wm. Curtis Noyes, in opposition, cited Nesmith *a.* Atlantic Insurance Co. (8 *Abbotts' Pr.*, 423); Giles *a.* Flagg, (MS.)

Moncrief, J.—The affidavit states that the case is on the calendar of the present (March) term of this court, and will very likely be reached on the first day of the term. Some such allegation was necessary to obtain an order to show cause, avoiding the usual notice of motion of eight days.

A stay of proceedings should not have been granted under such circumstances, except at the trial-term, or by the justice assigned to hold that part of the trial-term upon whose calendar the cause was placed. (*Rule* 39 *of the Supreme Court;* and *Code*, § 402.)

The reason of the rule and great propriety of the practice is obvious; otherwise the justice presiding at the trial-term ceases to control and regulate his calendar, and confusion and embarrassment accrue to counsel, clients, and others. The stay could have been vacated upon the application of the defendants. (*Code*, § 324.)

This application is made upon an affidavit of the attorneys for the defendants, upon the pleadings and proceedings in this action, and the printed case on appeal in the case of this plaintiff and another insurance company.

The affidavit states, that in the judgment of said attorney a fair and impartial trial cannot be had without a struck jury, and that the importance and intricacy of the cause require such a jury. It discloses that the action is on a policy of insurance issued to the plaintiff upon the ship "Senator" and the freight, claiming the vessel to have been totally lost in August, 1862, to the damage of the plaintiff of $15,000, and interest from September 5, 1860;—that the answer denies the allegation in

the complaint that said vessel was seaworthy when she sailed on her voyage; and charges that her loss was occasioned, not by perils of the sea, or by any perils insured against, but by the fault and neglect of the owner.

The affidavit goes on to state "two grounds of defence to the action, both of which (as is alleged) are intricate and difficult, and not within the region of common knowledge, viz.: 1. That the ship when she sailed on said voyage was unseaworthy; and, 2. That the master was chargeable with a want of competency and seamanship, in not making a near port of distress at the time when the water is alleged to have been gaining upon and disabling his vessel, and which he might and ought to have done in season to prevent her loss." That another action has been tried in this court, in which the said issue of unseaworthiness was tried, and the intricate and difficult nature thereof fully developed.

The unseaworthiness of the vessel can readily and intelligently be proven by the builder of the vessel, or by other competent persons who examined her at or about the time of her proceeding to sea, or by those employed or on board while at sea. This seems quite plain and simple. The competency of the master, or his want of skill and exercise of proper prudence and caution, when the circumstances in which his vessel was placed, as to her condition or otherwise, have been detailed, are susceptible of easy ascertainment by the evidence of those possessing proper skill and experience in the same vocation.

There seems to me nothing intricate about such a defence: it may be difficult to establish either branch of it to the satisfaction of a jury, but with the aid of learned counsel, the ability of skilful witnesses, and a charge from a learned judge, technical terms, if employed by witnesses, can be made appreciable to the common understanding.

The jury (a common, not a special jury), in the other and similar case, experienced no difficulty in determining the case submitted to them; they agreed upon a verdict in less than the time ordinarily taken for consultation. If, as appears to be intimated in the affidavit, a verdict for the plaintiff cannot be sustained upon the evidence in that cause, the reply is, the case should not have been submitted to them, and the verdict will be set aside as against evidence.

The trial of almost every case requires the employment of words technical in the law or other learned professions, or in the peculiar vocation under discussion. The jury are bound to find their verdict upon the evidence given upon the trial of the cause, not upon any personal experience or peculiar intelligence.

An examination of all the authorities found by me, including those cited by the learned counsel for the defendants, has not enabled me to discover a precedent for granting the motion in this case; and I ignore the fact that issue was joined in this case in November, 1862; and the case is upon the day calendar; and during the last term, while I was there presiding, the counsel for both parties, I think, for several days, answered "ready."

In Hartshorne *a.* Gelston (3 *Cai.*, 84), it having been suggested that the United States was interested in the cause, it was held that the parties litigant do not make a case important.

In Spencer *a.* Sampson (1 *Cai.*, 498), there was a question whether the statute used the disjunctive or conjunctive, and the court held the former. The motion was granted, for the reason that it is of great consequence to this court to protect its officers and those of the public in the discharge of their duty. The action was for words spoken of and concerning the plaintiff in his official character as attorney-general.

So, too, held in Van Vechten *a.* Hopkins (2 *Johns.*, 373); Thomas *a.* Croswell (4 *Ib.*, 491); Livingston *a.* Smith (1 *Ib.*, 141.)

In Livingston *a.* Smith, the affidavit alleged that the causes were, in the opinions of counsel, important: the only fact disclosed appears to be, that the claim in one suit was for $10,000, and in the other for $18,000. No opinion is given. And see Livingston *a.* Columbian Ins. Co. (2 *Cai.*, 28); Manhattan Co. *a.* Lydig (*Ib.*, 380). In New Windsor Turnpike Co. *a.* Ellison (1 *Johns.*, 141), the motion was granted, for the reason that questions of this kind affecting the public are important in their consequences.

In Anonymous (1 *Johns.*, 314), the rule was refused. Although the fact appeared that another cause on the same policy had been tried and the jury disagreed, the affidavit stated that the action involved questions of intricacy and importance.

In Wright *a.* Columbian Ins. Co. (2 *Johns.*, 211), a rule was

refused. The affidavit stated the claim to be upon a policy of insurance, claiming a total loss to the amount of $275,000.

In Poucher *a.* Livingston (2 *Wend.*, 296), it was said to be an extraordinary case, and the order was refused.

In Patchin *a.* Sands (10 *Wend.*, 570), it is held that a struck jury is never granted except in extreme cases.

Nesmith *a.* Atlantic Ins. Co. (8 *Abbotts' Pr.*, 423), if I remember accurately, was a case in which the jury had disagreed upon at least two trials; the claim was large, and difficult questions of law and of fact were involved, and Judge Pierrepont refused the order.

The case of Giles *a.* Flagg was important: of great public interest.

It will be observed that many of the cases cited, in which the rule was refused, were on policies of maritime insurance, under claims for total loss, and it is not unjust to assume that every question of defence arose which can arise in the present action.

The motion is denied, with ten dollars costs, to be paid by the defendants to the plaintiff or his attorneys.

KISSAM *a.* BARCLAY.

Supreme Court, First District; General Term, February, 1864.

LANDLORD AND TENANT.—OWNERSHIP OF BUILDINGS AND FIXTURES.—WIDENING STREET.

Buildings and fixtures erected by a tenant become real estate, and are governed by the laws which regulate land descending to the heir as part of the inheritance, or passing by deed as part of the freehold, in all cases except where a right of removal has been reserved, or where the buildings and fixtures were erected for the purposes of trade.

This rule applied against the mortgagees of a tenant, claiming the damages which had been awarded to the owner of the freehold, on a demolition of the building as a street improvement.

The failure of the tenant, in such case, to pay rent and perform the covenants of a lease,—*Held*, a bar to the action.

Appeal from a judgment.

This action was brought by William H. Kissam and Daniel Holsman, Trustees, &c., against James Barclay, Trustee, &c., and the Mayor, &c., of New York. The cause of action was on behalf of the mortgagee of a lease, against the reversioner, for a portion of the award made for damage to the house erected by the lessee on the property, on the widening of a street. The facts were as follows.

Daniel Holsman, the original lessor, leased the property No. 122 Anthony (or Worth) street, New York city, to Elizabeth Costello for twenty-one years, at the annual rent of $175; with covenant that the tenant should pay all taxes, duties, and assessments, ordinary and extraordinary, except the assessment for filling in, regulating, and paving the street; and that in case of any award to the lessor for damage on widening the street, seven per cent. interest thereon should be deducted thenceforth from the tenant's rent. Elizabeth Costello entered on said lot, and erected thereon a three-story brick building. Afterwards she mortgaged her lease to the guardian of Mr. Holsman's infant children (he having died, in the mean time, intestate) for $400. On a partition of his estate, the lot in question was assigned to Mrs. Barclay, one of his daughters, and wife of Clement B. Barclay, and vested in the defendant, James Barclay, as her trustee. The mortgage was assigned to the plaintiffs, the trustees of another daughter of Mrs. Wetmore. In 1860 the street was widened, and the commissioners allotted $2,400 to the defendant for damages (which included $1,000 for damages to the house), and assessed him $1,100 for benefit; they also apportioned Mrs. Costello's rent, by deducting therefrom seven per cent. on the amount of the award, reducing it thereby to $10.80. The assessment was confirmed September 27, 1860. One month afterwards, the defendant Barclay dispossessed Mrs. Costello for non-payment of rent, and took possession of the building. The plaintiff brought this action to enjoin the defendant Barclay from receiving any portion of the $1,000 awarded for damage to the house until their mortgage was paid, and to compel the payment of their mortgage and interest out of the same.

The money in question was subsequently paid into court, and the action went to trial between the plaintiffs and the defendant Barclay, and was decided in favor of the defendant, the following opinion being written.

Clerke, J.—Although the house, of which the commissioners cut off a part in widening Worth-street, was erected by Mrs. Costello, yet this gave her no further right to it, as a part of the realty, than the mere use of it during the continuance of her lease, which expired in 1861, without any right of renewal. The commissioners could not, therefore, have allowed her any thing for any injury to the building itself, but only a compensation for her diminished use of it: the building she had no right to remove on the expiration of the lease—it became, I repeat, a part of the realty; and in the lease, no right of removal was reserved.

The cases referred to by the plaintiffs' counsel are cases where the right of removal was reserved, or where the buildings and fixtures were erected by a tenant for the purposes of trade. In all other instances, erections of every kind become real estate, and are governed by the law which regulates land descending to the heir as a part of the inheritance, and passing by deed as a part of the freehold. Mrs. Costello was compensated by the commissioner in the only way in which she was entitled to be compensated, by a reduction of her rent to the extent of seven per cent. on the amount awarded to the defendant, an arrangement which the lease itself had contemplated. This is a sufficient answer to the plaintiffs' claim; but as they would not, under any circumstances, be entitled to any thing more than what their mortgagor would have been entitled to, and as she evidently would be entitled to no redress under this lease until she had performed her covenants, on this ground also they would necessarily fail in this action. She neglected to perform her covenants to a considerable extent in not paying taxes and assessments; and before she could have sought equity, she should have done equity.

From the judgment entered in conformity with this opinion and decision, the plaintiffs appealed.

Benjamin T. Kissam, for the appellants.—I. The building having been erected by Mrs. Costello, upon the lot of land demised, for trade, business, and a profitable use of the premises, did not become a part of the realty, but continued personal estate, and the lessee had full right to remove it. (*Taylor's*

Landl. & Ten., 3 ed., §§ 544–546; Holmes *a.* Tremper, 20 *Johns.*, 29; Miller *a.* Plumb, 6 *Cow.*, 665; Mott *a.* Palmer (1 *N. Y.*) 1 *Comst.*, 564; Dubois *a.* Kelly, 10 *Barb.*, 496; Van Ness *a.* Packard, 2 *Pet.*, 137, 144; Moore *a.* Wood, 12 *Abbotts' Pr.*, 393; Kelsey *a.* Durkee, 33 *Barb.*, 410.)

II. The improvements, belonging to Costello's representatives, were subject to the lien of the plaintiff's mortgage. The money awarded became a substitute for the property taken. (Astor *a.* Miller, 2 *Paige*, 68, 76.)

III. No matter to whom the damages may be awarded, the person to whom they of right belong may sue for and recover the same. (2 *Laws of* 1813, 418, ch. 86, § 184; Coutant *a.* Catlin, 2 *Sandf. Ch.*, 485.)

IV. The plaintiffs' rights have not been altered by turning the property into money. (Astor *a.* Miller, 2 *Paige*, 68, 76; Astor *a.* Hoyt, 5 *Wend.*, 603, 612, 618.) The plaintiffs' mortgage has been a lien since August, 1842, and they are entitled to judgment for the same. (2 *Laws of* 1813, 418, ch. 86, § 184; Coutant *a.* Catlin, 2 *Sandf. Ch*, 485; Ombony *a.* Jones, 19 *N. Y.*, 234.)

John Pyne, for the respondent.—I. Buildings erected by the lessee become the property of the reversioner, and no person, not even the tenant, has the right to remove them. (Abeel *a.* Radcliff, 15 *Johns.*, 505; Fisher *a.* Saffer, 1 *E. D. Smith*, 611; Snediker *a.* Warring, 12 *N. Y.* (2 *Kern.*), 170; Smith *a.* Benson, 1 *Hill*, 176; *Amos and Ferrard on Fixtures*, 2, 9; *Toml. Law Dict.*, *tit. Fixtures*; Goodrich *a.* Jones, 2 *Hill*, 142; Buckley *a.* Buckley, 11 *Barb.*, 43, 61.) Even were they removable, the right ceased on the determination of the lease. (*Amos and Ferrard on Fixtures*, 87; Lyde *a.* Russell, 1 *Barn. & Ad.*, 394; Weston *a.* Woodcock, 7 *M. & W.*, 14; Gaffield *a.* Hapgood, 17 *Pick.*, 192; Poole's Case, 1 *Salk.*, 368).

II. The plaintiffs can under no circumstances be entitled to a greater interest than that of their mortgagor. (1 *Rev. Stat.*, 739, § 143.)

III. Money to arise from possible future assessments is not covered by the ordinary form of a present mortgage. Even rents are not carried by it. A mortgagee has no interest before foreclosure. (Bank of Ogdensburgh *a.* Arnold, 5 *Paige*, 38; Morris *a.* Mowatt, 2 *Ib.*, 586.)

IV. If the mortgagees had any right to the sum awarded (which they have not), they should show payment under covenant in lease, or at least readiness to pay the rent, taxes, and assessment for benefit. (Astor *a.* Hoyt, 5 *Wend.*, 603; Trinity Church *a.* Cook, 11 *Abbotts' Pr.*, 371; S. C., 21 *How. Pr.*, 89; Post *a.* Kearney, 2 *N. Y.* (2 *Comst.*), 394; Dean & Chapter of Windsor *a.* Hyde, 5 *Rep.*, 24; Laws of 1842, 293, ch. 240, § 1.)

V. The assessment having been confirmed, the court cannot take notice of or rectify any error. (Matter of Anthony-street, 20 *Wend.*, 618; Wiggin *a.* Mayor, &c., of N. York, 9 *Paige*, 16.)

The court (Leonard, Clerke, and Sutherland, JJ.) affirmed the judgment. No opinion was written.

THE STATE BANK OF TROY *a.* THE BANK OF THE CAPITOL.

Supreme Court, Third District; General Term, December, 1863.

Bills and Notes.—Liability of Collecting Bank.—Presumption.—Measure of Damages.

The duty and obligation of banks, acting as agents for the collection of negotiable paper, in respect to notifying indorsers, stated.

It seems, that a bank to whom negotiable paper is delivered for collection merely, discharge their duty by a proper demand of payment, and by giving notice of non-payment to their principal, without giving the proper notice also to other indorsers, unless some contract or commercial usage be shown to raise a more extended obligation.

The plaintiffs, a bank employed to collect a draft, sent it to the defendants, their local correspondents at the place of payment, for collection; and the latter, upon its dishonor, returned notice thereof to the former, with notices also addressed to each of the prior indorsers. These notices were by the plaintiffs forwarded to their respective addresses; but the one addressed to the only solvent indorser contained a clerical error, upon the ground of which he successfully defended himself, when sued on his indorsement, and recovered judgment for costs against the holder of the draft. The latter then sued the plaintiffs in this action for their negligence in the agency, and recovered judgment for the amount of the draft, and for the costs of the first action. The plaintiffs now sued their sub-agents, who had prepared the erroneous notice, and recovered both the amount of the debt and the costs of the former actions.

Held, that there having been no proof of an agreement or of a commercial usage requiring the collecting agent to do more than give notice to his principal, and it not having been objected on the trial that the principal was misled by the error in the notice, the verdict could not be sustained.

The fact that the collecting agent assumed to send notices to all parties ready to be forwarded, is some evidence, but not sufficient, alone, to show an agreement to notify all.

Exceptions heard in the first instance at the general term.

J. Romeyn, for plaintiff.

Ira Shafer, for defendant.

By the Court.*—Hogeboom, J.—This action is brought by the plaintiff against the defendant, to recover damages for defendant's negligence in the protest of a draft sent to it for collection by the plaintiff.

The defendant was the plaintiff's collecting agent at Albany, where the draft was payable. It was drawn by Oramel Brewster on Arland Carroll, and payable to the order of W. C. Watson, and indorsed by him, by John Roth & Co., to David Dater, who was the owner thereof, and who indorsed and delivered it to the plaintiff for collection; and the plaintiff, through its cashier, thereupon indorsed and delivered it to the defendant, who was located at Albany, for collection.

Payment of the draft was duly demanded but not made, and thereupon the defendant in due season sent notices of protest to the plaintiff for itself, and all the previous parties to the draft, directed to them in their proper names, except W. C. Watson, whose name was Winslow C. Watson, but who was described in the notice of protest as Wm. C. Watson.

The notices to the indorsers, received by the plaintiff from the defendant, were seasonably forwarded by the plaintiff, and reached them.

That directed to Wm. C. Watson came to the hands of the indorser W. C. Watson, at Port Kent, where he resided, and to which place the notice had been forwarded by the plaintiff.

Dater being the owner of the draft, prosecuted some or all of the previous parties to the paper, including the acceptor, but

Present, Hogeboom, Peckham, and Miller, JJ.

they were insolvent, except Watson; and he was defeated, as to him, by reason of the misdirection in the notice of protest.

Dater thereupon prosecuted the plaintiff, in whose hands he had placed the draft for collection, for negligence and improper protest of the draft as to Watson, and recovered.

That recovery embraced not only the amount of the draft and interest, but the costs both of the prosecution and defence in the suit of Dater *a.* Watson, which Dater had paid; and which suit Dater had given the plaintiff notice to defend.

The plaintiff thereupon brought this action against the defendant, for like negligence and improper protest of the note; and he having given the defendant notice of the previous suits of Dater *a.* Watson, and Dater *a.* The State Bank of Troy, during the pendency thereof, he was permitted to recover in this action:

1. The amount of the draft, and interest.
2. The costs of the suit.
3. The costs both of the prosecution and defence of the suit of Dater *a.* Watson.
4. The costs both of the prosecution and defence of the suit of Dater *a.* The State Bank of Troy.

The rulings at the circuit were, it is evident, designed to be liberal in favor of the plaintiff, to the end that if the plaintiff was entitled to recover for all or only a portion of these items, the amounts of which were readily ascertainable from the evidence, a new trial might be avoided if possible, and the verdict properly corrected, if necessary, as to amount; or if not, or the defendants were entitled to a verdict, that a single new trial would be sufficient to adjust the rights of the parties according to law. The exceptions to evidence, and to the charge of the court, are presented in so many various forms as to make this practicable.

To dispose of this case correctly, it is of importance to see, in the first place, what was the precise duty and obligation of the defendant. The defendant was the plaintiff's collecting agent at Albany, and received the draft in question for the purpose of collection.

Ordinarily, it is claimed, on the part of the defendants, this duty is satisfied by a demand of payment; and in the event of non-payment, seasonable notification of that fact to its principal. (*Edwards on Bills*, 476; Mead *a.* Engs, 5 *Cow.*, 303; Bank of

U. S. *a.* Davis, 2 *Hill*, 451; Spencer *a.* Ballou, 18 *N. Y.*, 327; Farmers' Bank of Bridgeport *a.* Vail, 21 *N. Y.*, 485.)

It had no interest in the draft itself, and had contracted no obligation to any of the other parties to the draft.

It was its duty to notify the plaintiff, without delay, of the non-payment of the draft, in order that the plaintiff might seasonably notify the previous parties to the paper.

The time allowed to the defendant, for this purpose was the same that would have been allowed to the defendant, if it had been the actual owner and holder of the paper. For the purposes of protest, a collecting agent occupies the position, and is held to the obligations, of a holder of commercial paper. (Mead *a.* Engs, 5 *Cow.*, 303; Howard *a.* Ives, 1 *Hill*, 263; Bank of United States *a.* Davis, 2 *Hill*, 451; Farmers' Bank of Bridgeport *a.* Vail, 21 *N. Y.*, 485, 488; Ogden *a.* Dobbin, 2 *Hall*, 112.)

As the ultimate indorsee (if it had owned the paper itself), it would have been entirely at its own option whether to give notice of protest only to its immediate indorser, or to all the previous parties to the draft, or not to give any notice at all. In such event, as last suggested, the drawer and all the indorsers would be discharged, and the acceptor alone held, on due demand of payment from him. If satisfied with the responsibility of the last indorser, a demand of payment and notice to such last indorser would have been sufficient.

As collecting agent for the plaintiff, its duties were somewhat different, and dependent upon the express or implied contract which it had made with the plaintiff. It had made no contract with any other person.

If the contract with the plaintiff was to demand payment of the note, and notify all the parties of the non-payment, such contract must of course be fulfilled. Such a contract is sometimes made in express terms, and sometimes it is implied from custom, and usage, and the course of business. (Smedes *a.* Bank of Utica, 20 *Johns.*, 372; 3 *Cow.*, 662; *Edwards on Bills*, 475, 476.) In such case, it is, of course, obligatory. Whether in the case of a bill or note sent for collection merely, and in the absence of an express contract as to the precise duty to be performed, the presumption of law is that the corresponding or collecting agent will take the necessary steps to charge

all the parties to the paper, is a question of much embarrassment, and not, I think, as yet clearly settled in this State. I am inclined to think that in such case (there being no proof of express contract or usage) it is not obligatory on the corresponding bank to notify and duly charge all the prior parties to the paper.

I state this proposition as, on the whole, the result of the adjudications in this State, although it must be confessed that, for a case so likely to occur, and to require the existence of a clear and well-established rule, the cases are far from uniform.

In Mead *a.* Engs (5 *Cow.*, 303), the suit was against an indorser, to whom notice of protest was sent from the next preceding indorser, after an interval of some days had occurred in transmitting by subsequent indorsers, though in each case it had been sent to the next preceding indorser the day after it had been sent to his indorser.

The court laid down this rule: "One to whom a bill or note is indorsed as agent to collect (*e. g.*, a bank), is a holder for the purpose of giving and receiving notice of non-payment; and he is not bound to give notice of non-payment directly to all prior parties, but may notice his next immediate indorser, who is bound to notice his indorser, &c., in the same manner as if the bill or note had been negotiated for a valuable consideration."

The defendant had offered evidence that it was the custom of New York banks which received bills or notes for collection, to give notice of non-payment directly to all prior parties. This evidence was excluded, and, as the Supreme Court held, properly, as not being material. They say: "The evidence of custom, which was rejected by the judge, was in no respect material. It is prudent, and probably customary, for the holders of bills of exchange to give notice of their dishonor to all the parties to the bill. They may not wish to run the hazard of some of the parties being discharged by the omission of such notice. But if the holder is satisfied with the responsibility of his immediate indorser, there is no necessity for his giving notice to any previous party; and if such notice is given by the other parties to the bill, the holder may recover against any of them." (p. 309.)

In Howard *a.* Ives (1 *Hill*, 263), and Bank of the United

States *a.* Davis (2 *Ib.*, 451), the same general principle is recognized, that an agent holding paper for collection is a principal for the purpose of transmitting notice of protest.

The marginal or head-note of the latter case contains this proposition: "Where a bill or note is indorsed by the holder, and sent to an agent for collection, the latter need not give notice of dishonor to all the parties, but it is enough if he notify his principal, who may charge the prior parties, by giving them notice himself; and this though it appear that had the notices been sent by the agent they would have been received sooner."

Other cases in our own courts affirm the same general doctrine; and they appear on their face to state, in unqualified terms, that the duty of the collecting agent is discharged if he seasonably notify his own principal.

But it is proper to observe that they seem to be cases where the question arose between the holder and an early indorser; and the right of recovery turned upon the point, whether such indorser could be charged by consecutive notices on successive days from each indorser to his next preceding indorser: and the question did not arise between the holder of the paper and the collecting agent to whom it had been sent for collection, where the right of recovery turned upon the nature of the contract which such agent made with his principal, whether such contract was to notify only his principal, or all the previous parties to the paper.

This latter question, however, arose directly in the case of Smedes *a.* The Bank of Utica (20 *Johns.*, 372); S. C., in error (3 *Cow.*, 662).

It was an action of assumpsit against the bank, to recover damages for default in notifying all the indorsers. The general proposition is thus stated in the head-note of the case: "Where a promissory note is indorsed and delivered to a bank for collection, there is an implied undertaking on the part of the bank, in case the note is not paid, to give notice of the default of the maker to all the indorsers." It is to be noticed, however, that the plaintiff, in order to support his cause of action, proved that it was the uniform custom, and established understanding of banks, to give notice to all the indorsers.

There was no contradiction to this testimony, and on the strength of it the plaintiff recovered.

The court said (p. 378), that they thought they might take judicial notice of this general custom and understanding; but that, at all events, it was fully proved in the case. The case was affirmed in the Court of Errors, although there the question turned mainly on the point whether a sufficient consideration for the undertaking of the bank was alleged and proved.

In Curtis *a.* Leavitt (15 *N. Y.*, 1, 167), this matter is incidentally alluded to in the opinion of Justice Shankland, as follows: "There is another class of obligations into which these banks can enter, and which, though not expressed, are yet inferred, as incidental to the power of receiving deposits. It is that of assuming to charge indorsers of the notes of its customers, left with the bank for collection. This obligation springs out of the custom of bankers, receiving such notes to collect on the express or implied agreement that the money, when collected, will remain on deposit, for some short time at least, for the benefit of the bank. If the bank neglects to use due diligence to charge indorsers on commercial paper thus left with it, it is subjected to the loss. This responsibility of banks has been enforced in this State in numerous instances." (20 *Johns.*, 372; 3 *Cow.*, 662; 11 *Wend.*, 473; 22 *Ib.*, 215; 6 *Hill*, 648.)

In Bank of Utica *a.* McKinster (11 *Wend.*, 473), the question was not discussed, but the liability, in a proper case, was assumed to exist. The chancellor says:

"By the decision of this court in the Bank of Utica *a.* Smedes (3 *Cow.*, 662), it was settled that the bank was liable to an action for a neglect to give notice to the indorsers according to the usual course and practice of banks."

In Montgomery County Bank *a.* Albany City Bank (7 *N.Y.* 3 *Seld.*, 459, 461), Judge Jewett declares it to be a rule of law well settled in this State, that a bank receiving a bill from the owner for collection is bound to present it for acceptance and payment; and if not paid when presented for payment, it must take such steps, by protest and notice, as are necessary to charge the drawer or indorser, or it will be liable to its principal, the owner, for the damages which the latter sustains by any neglect to perform such duties, unless there be some agreement to the contrary, express or implied.

In the case of Allen *a.* The Merchants' Bank of New York (22 *Wend.*, 214, 228), Senator Verplanck, delivering the opinion of

a majority of the court, uses this strong language: "It is well settled in this State, that there is an implied undertaking by a bank or banker receiving negotiable paper deposited for collection, to take the necessary measures to charge the drawer, maker, or other proper parties, upon the default or refusal to pay or accept. (Smedes *a.* Bank of Utica, 20 *Johns.*, 372; and S. C. in this court, 3 *Cow.*, 662; McKinster *a.* Bank of Utica, 9 *Wend.*, 46; S. C., 11 *Ib.*, 473, 478)."

These authorities on each side of this question do not, in my opinion, leave the matter free from doubt. I am inclined to think that the tendency of the later adjudications is, in the absence of proof of any express contract or of commercial usage, to treat a mere corresponding or collecting agent as discharging its duty by a proper demand of payment, and notice of non-payment to its principal. I am the more inclined to adopt this conclusion from the insignificant benefit or compensation usually received by banks for the performance of a service so responsible and important.

I am not without doubt as to what the true rule of law is, but on a new trial the case may perhaps, to some extent, be relieved of some embarrassment by affirmative proof of an express contract or established custom. I think, therefore, the defendant's duty would have been discharged on seasonably notifying the plaintiff of the non-payment and protest of the note.

But the defendant undertook to do something more; and the question is, whether that is evidence of its having agreed to do something more; or if not, whether the manner of doing it was such as naturally to mislead the plaintiff, and to induce a course of conduct by the latter which has subjected it to pecuniary liability to others. The defendant did what it was not probably obliged to do, to wit, transmit notices of protest for other parties.

This might be some evidence of an agreement to notify all the indorsers; but not sufficient evidence, I think, of such an agreement in the absence of proof of custom or usage, or of an express contract.

But in sending these notices of protest it misdescribed one of the indorsers, by calling him Wm. C. Watson, instead of W. C. Watson or Winslow C. Watson; and the plaintiff, doubt-

less relying upon the correctness of the address, forwarded the identical notice sent to it. It may be claimed that the act of the defendant, in misdescribing Watson, misled the plaintiff, and produced all the injurious results which followed; that as the defendant had possession of the draft, and the opportunity of inspecting the signature of the indorser, and the plaintiff had not (at the time the notice was sent), the latter had a right to rely upon the correctness of the address thus sent; that it was, in effect, a representation that such was the name of Watson, in fact, or as it appeared on the paper in question.

It may be that there was a question for the jury on this point, but as it was not made on the trial, and does not appear to have governed the court in the disposition of the case, I think it ought not to control us upon this occasion.

It results from these observations that a new trial must be granted in this case. For—1. If there was no express or implied contract further than is shown in this case, the only notice of protest which the defendant was obliged to give, as we, on the whole, are inclined to hold, was that to the plaintiff; and that was seasonably sent. On such proof, the defendant, and not the plaintiff, would be entitled to a verdict. The notification to the defendant of the object and pendency of the two previous suits brought by Dater, did not impose upon it the obligation to defend. Such a notice has no effect, unless there be some relation or privity between the parties in regard to the subject of the litigation. 2. As the defendant had made no contract, express or implied, with Dater, or any of the parties to the draft, except the plaintiff, it cannot be responsible to Dater or the plaintiff for his failure to recover against Watson or the plaintiff. It had not agreed with Dater to notify Watson of the non-payment of the note, and hence would not be responsible to Dater for not doing so. Hence it would not be responsible for the costs of the litigation between Dater and Watson. 3. Nor had it made any contract with the plaintiff to notify Watson. It was the plaintiff's own business to do so; or to notify Dater, and give him an opportunity to do so. If it had made such a contract, it would have been liable for the costs of both suits, as it was notified of the pendency of both, and had an opportunity to conduct the one and defend the other. But as it had not made such a contract, it was not

liable for the costs of either litigation. 4. The foregoing suggestions are made with reference only to the proceedings as they stand in the case now considered.

If the plaintiff, on a new trial, shall be able to satisfy a court and jury, either—1. That there was an express contract to notify all the indorsers; or, 2. That there was an implied contract, resulting from commercial usage, or the course of business; or, 3. That the natural and necessary result of the misdirection of Watson's name in the notice of protest was to subject the plaintiff to the damages sustained by it in the litigations to which it has been subjected;—then the plaintiff will be entitled to recover against the defendant for such damages. The precise amount of them, as well in regard to the items of costs as otherwise, will depend upon the circumstances developed on the trial, and may to some extent be varied by the character or degree of the proof offered.

In what has been said, it has been assumed that Watson was discharged from liability by the insufficiency of the notice. This is in accordance with what is alleged to have been the decision of this court in regard to this very notice in some one of these actions. I do not find the case reported, nor have we been supplied with the opinion of the court. As an original question, with my present views, I should have come to a different conclusion; but presuming the court gave to the question mature deliberation, and made the decision claimed, it is more appropriate, and, indeed, obligatory upon us, to conform to the views thus expressed.

There must be a new trial, with costs to abide the event.

GODDING *a.* PORTER.

Supreme Court, Sixth District; Special Term, April, 1864.

REFEREE'S TIME TO REPORT.—REFERENCE OF CLAIM AGAINST EXECUTOR, &C.—MOTION TO CONFIRM.—COSTS.

Section 273 of the Code, requiring referees to report within sixty days, does not apply to a case of reference under the approval of the surrogate, where an executor or administrator doubts the justice of a claim.

Only those claims against the estate of a deceased person are referable, under 2 Rev. Stat., 90, which accrued during his life, or would have accrued against him if he had lived.

Where a testator, in his will, gave to his widow as much as she would need for support,—*Held*, that an account against the estate for support furnished by a third person was not referable under the statute.

Where, upon a motion to confirm the report of a referee on a claim against the estate of a deceased person, referred under the statute, the moving papers show incontrovertibly a claim of a nature not referable, the defendant may oppose the motion to confirm the report of the referee without making a case.*

On denying the motion to confirm, costs will not be given, for the reference was by the defendant's consent.

And the court will not order the report to be set aside, for the plaintiff may desire to test its validity as an award.

Motion by plaintiff for an order confirming the report of a referee in favor of the plaintiff for $95, and for judgment.

William Curry, deceased, by his last will and testament, gave to his wife as much of his money and property as she should need for her comfortable support. Her brother, the plaintiff's intestate, furnished her with necessary support in board, washing, &c. After his decease, Alvah Godding and Esther Sanders, his administrators, presented the account to the defendant Porter, the executor of Curry, by whom payment was refused.

They then entered into an agreement to refer the claim, under the statute, to Charles G. Day, Esq., and the county judge of the county of Tompkins having approved the agreement, the usual order was entered appointing him referee.

* Compare, however, Coe *a.* Coe, 14 *Ante*, 86.

The report of the referee, which was dated on the 29th of August, 1863, found that the plaintiffs had furnished support and services as alleged, and that the defendant was indebted therefor in the sum of ninety-five dollars.

The plaintiffs now moved for an order confirming the report, and for judgment.

The objections raised by the defendant are stated in the opinion.

B. G. Ferris, for the motion.

George D. Beers, opposed.

Balcom, J.—This motion is founded on the agreement of the parties to refer, the approval of the referee by the county judge of Tompkins county, the rule of reference entered by the clerk of such county, and the report of the referee. No case has been made showing what occurred on the trial.

The motion is opposed on two grounds—1. That the referee did not make and deliver his report within sixty days from the time the action was finally submitted to him; 2. That the claim was not referable, under the statute, without action.

The defendant's counsel has read an affidavit in support of his first point; but I shall not consider it, for I am of the opinion that a referee, to whom a claim against the estate of a deceased person is referred, under the statute, with the approval of the surrogate, is not required to make and deliver his report within any specified time. Section 273 of the Code, as amended in 1863 (*Laws of* 1863, 660, ch. 392), is not applicable to such a case, for that provides, in case the referee shall not make and deliver his report within sixty days from the time the action shall be finally submitted, the action shall proceed as if no reference had been ordered. When a claim is referred under the statute, with the approval of the surrogate, there is no action until the rule of reference is entered; and when that is set aside or made inoperative, the action falls. Section 273 of the Code applies only to references of issues in actions commenced as prescribed by the Code.

But I am of the opinion, that the point that the claim was not referable, under the statute, without action, is fatal to the motion. The claims mentioned in the statute, which may be re-

ferred with the approval of the surrogate, are those that arise out of something done, commenced, or omitted in the lifetime of the deceased person whom the disputing executor or administrator represents. They are only such as accrued during the life of the deceased, or would have accrued against him if he had lived. (2 *Rev. Stat.*, 88–92; *Laws of* 1859, 569, ch. 261.) A claim against an executor for a legacy cannot be referred, under the statute, with the approval of the surrogate, without action, because it is not a claim against the estate he represents, within the meaning of the statute. A legacy is not to be paid, if there is not sufficient of the estate left for the purpose after paying the debts of the deceased. The claim of the plaintiffs in this case, was not against the estate of William Curry, deceased, but against the defendant, though payable by the latter out of the estate of the former in his hands. It was not payable until all the debts contracted by the deceased were fully paid. And if the estate of the deceased had been insufficient for the payment of his debts, the idea of the plaintiffs having a claim against such estate for the support of the widow of the deceased, subsequent to his death, would never have been conceived. The plaintiffs' claim could not be referred under the statute, unless a claim for a specific legacy could be so referred. And that a claim for such a legacy could not be so referred, does not, in my judgment, admit of a doubt. I am therefore of the opinion the plaintiffs' claim was not one that could be legally referred, under the statute, with the approval of the surrogate, without action.

I am also of the opinion that the defendant may oppose the motion to confirm the referee's report, though he has not made any case showing what the proceedings were before the referee; for the moving papers incontrovertibly show the claim was one that could not be referred in the manner it was referred, and nothing could have transpired before the referee to change the case or avoid this objection to the motion. The agreement to refer, and the report of the referee, show conclusively that the referee had no jurisdiction to hear the case or decide upon the claim, unless he could do so as an arbitrator. (See Akely *a.* Akely, 17 *How. Pr.*, 21.)

If the report should be confirmed, and the plaintiffs should enter judgment thereon, the judgment could be reversed on ap-

peal. (See Raynor *a.* Clark, 3 *Code R.*, 230; Wilkinson *a.* Tiffany, 4 *Abbotts' Pr.*, 98.) The judgment could be reversed on appeal, because the record itself would show it was erroneous.

For these reasons, the motion to confirm the report of the referee must be denied, but without costs. The defendant is not to have costs for raising this jurisdictional question, after entering into an agreement which assumed that the claim might be legally referred under the statute.

I think no order should be made setting aside the report, for the defendant has not made a case, and the plaintiffs may desire to test its validity as an award.

JONES *a.* SEWARD.

Supreme Court, First District; General Term, March, 1864.

REMOVAL OF CAUSES.—JURISDICTION OF COURTS OF UNITED STATES.

Section 5 of the Act of Congress of March 3, 1863, relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases,—which provides that the defendant in any action for arrest or other trespass, &c., done under color of the authority of the President, or any law of Congress, may have such action removed into the Circuit Court of the United States,—is constitutional and valid.

Congress may give the circuit courts exclusive jurisdiction in any cases in which the Supreme Court of the United States has appellate jurisdiction.

In cases within that statute, though it is not essential, it is proper to apply to the State court in which the action is first brought, for an order for its removal, and such order should be granted.

It seems, that the bond should equal the sum for which the defendant has been held to bail, if at all.

Appeal from an order denying petition to remove the cause to the Circuit Court of the United States.

The action was by George W. Jones, late the Minister of the United States to New Grenada, against William H. Seward, Secretary of State of the United States, to recover damages for an alleged false imprisonment of the former by order of the latter in November, 1861. The complaint alleged that the defendant, by himself and others acting under his direction, with-

out legal process or lawful authority of any name or kind, and without cause, had the plaintiff arrested in the city of New York, and confined in Fort Lafayette for the space of four months. The defendant now moved upon petition for an order removing the cause to the Circuit Court of the United States for the Southern District of New York, under the act of Congress passed March 3, 1863, entitled "An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases."

The plaintiff's petition alleged—

"That he is the Secretary of State of the United States of America, and has been such since the organization of the Cabinet under the administration of Abraham Lincoln, President of said United States.

"That, as your petitioner is informed and believes, the action above entitled is brought against your petitioner for acts alleged to have been done by him as Secretary of State of the United States of America, under authority derived by him from the President of the said United States, in causing and procuring the plaintiff to be arrested and imprisoned, or for some other wrong alleged to have been done the plaintiff under such authority, during the present rebellion of the so-called Confederate States against the Government of the United States of America.

"Wherefore, he prays that on the filing of this petition this action be removed for trial to the next Circuit Court of the United States for the Southern District of New York.

"Your petitioner hereby and herewith offering good and sufficient surety for his filing in such circuit court, on the first day of its session, copies of the process and other proceedings against him in this action, and also for his appearing in such court, and entering special bail therein, if the same can legally be required. WM. H. SEWARD.

"NEW YORK, June 15, 1863."

The usual verification and authentication were added.

The bond offered, upon presenting the petition, contained the following condition:

Whereas, the said action has been brought for alleged acts of injury said to have been done by the plaintiff, as Secretary of State of the United States of America, under authority derived

from the President of said United States, during the present rebellion of the so-called Confederate States against the Government of the United States of America.

"And whereas, the said William H. Seward has subscribed and verified a petition to have said action removed for trial to the Circuit Court of the United States for the Southern District of New York, under the fifth section of the Act of Congress, passed March 3d, 1863, entitled an 'Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases.'

"Now, if the said William H. Seward shall, at the next Circuit Court of the United States for the Southern District of New York, on the first day of its session, file copies of the process and other proceedings in this action, and appear in said court and enter special bail therein, if the same were originally required in said action, then the bond or obligation to be void, otherwise to remain in full force and virtue."

In opposition to the motion, the plaintiff presented an affidavit, in which, after stating his arrest, he alleged that he was kept a prisoner in close confinement for near the space of four months, and was not allowed to send any communication to his friends or other persons with a view of seeking legal relief, and had never been informed of the cause of his arrest or the authority whereby he was arrested, although often demanded, except as shown, by the person who arrested him, the following telegram:

"The Hon. Geo. W. Jones, late Minister to Bogota, and late Senator in Congress from Iowa, leaves here this afternoon for New York Hotel, arrest him and send him to Fort Lafayette.

"W. H. Seward.

"Dated, Washington City, Dec. 19, 1861."

The motion was denied at the special term, the following opinion being rendered:

Clerke, J.—This is an action in which the plaintiff claims damages for an alleged false imprisonment. The defendant asks for an order of this court to remove the action, and all proceedings therein, to the next Circuit Court of the United States, to be held in and for the Southern District of the State of New York. The defendant states in his petition for this order, that the action is brought for acts alleged to have been done by him

as Secretary of State for the United States of America, under authority derived by him from the President of said United States, in causing and procuring the plaintiff to be arrested or imprisoned, or for some other wrong alleged to have been done to the plaintiff under such authority, during the present rebellion of the so-called Confederate States against the government of the United States of America; and that it, therefore, comes within the act of Congress passed March 3, 1863, entitled "An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases," providing, in the 5th section, that if any suit has been or shall be commenced against any officer, civil or military, or any other person, for any arrest, imprisonment, trespass, or wrong done, or any act omitted to be done during the present rebellion, "by virtue or under color of any authority derived from or exercised by or under the President of the United States or any act of Congress," the defendant may remove such action into the Circuit Court of the United States for the district where the suit is brought, on complying with certain requirements stated in the act.

Of course, this act, so far as it directs the transfer of cases from the State to the Federal jurisdiction, if it has any constitutional foundation, is founded upon the third article of the Constitution of the United States, defining the extent of the judicial power delegated by the States to the Federal government, and particularly upon that part of section 1 of said article which says that "the judicial power shall extend to all cases in law and equity arising under this Constitution," &c. The defendant, in this application, maintains that the defence which he intends to set up in this action arises under the Constitution of the United States; the question to be determined being, whether the President of the United States, during a rebellion or insurrection, can arrest or imprison, or authorize another to arrest or imprison, any person not subject to military law, without any order, writ, precept, or process of some court of competent jurisdiction. Now, we assume that this question, if a question at all, would arise under the Constitution of the United States; that is, whether the President possesses this power, either in his civil capacity, or as commander-in-chief of the army and navy of the United States, can be solved only by consulting and interpreting that instrument. But, to entitle the defendant to

this order, and to give the courts of the United States jurisdiction of this action, there must be some appearance or color of substance in it. It must have some speciousness, some seeming plausibility, and must not be palpably devoid of any ground of doubt. Can it then be a question, presenting any appearance of substance or color of doubt, whether the Constitution of the United States of America has invested its chief executive officer with power to arrest or imprison, or to authorize another to arrest or imprison, any person not subject to military law, at any time, or under any exigency, without some order, writ, or precept, or process of some civil court of competent jurisdiction?

I. It cannot, of course, be pretended by the most ardent advocate of this high Presidential prerogative, that the Constitution confers it in set terms. There is, assuredly, nothing in that instrument which can be tortured into the conferring of such a power on the President in his civil capacity. And this, it appears to me, plainly disposes of the question; for, it would be asserting the grossest contradiction and strangest anomaly to say, that absolute and unlimited power, equal to any exercised by czar or sultan, can be implied from a Constitution, which avowedly gives no power to any department of the government that is not specifically set forth, except simply the consequent right to employ all legal means necessary to the execution of the power.

It may not, however, be out of place, at a time like the present, to glance at the position which some ardent advocates of Presidential unlimited prerogative, in seasons of war, rebellion, or insurrection, have endeavored to uphold. It is demanded for the President, by these advocates, from the nature and necessities of his office, in time of imminent peril to the very existence of the nation. They have ventured to say, that the authors of this Constitution, could never have intended to deny to him, in such times, all power which may be deemed indispensable for the preservation of the nation, when it is convulsed with civil commotion and threatened with the hostility of foreign powers. But if there is any thing beyond all controversy in the constitutional history of this nation, it is, that the purpose of this Constitution, and the provisions which it contains, were, for a considerable period before its adoption, anxiously and deliberately considered and thoroughly discussed

by the people at large and by their delegates in the convention; and certainly, any man proposing to confer unlimited power on any department of the government, on any pretext whatever, would not have been deemed sane. With far-seeing caution, and the most vigorous and deliberate purpose, a constitution for a national government was framed, conferring extremely limited powers, concisely and minutely specified, at the same time providing ample means for self-preservation and the vigorous exercise of necessary authority under all emergencies. Its authors and the people of the several States had plainly set before them, while it was under consideration, the example and experience of that nation from which their language, their laws, their social customs, and political institutions were mainly derived; and they well knew that the contest which convulsed that nation for four centuries with great alternations of triumph and defeat, vital and pre-eminent immeasurably above all others, related to the power of the crown over the personal liberty of the subject. No doubt, before constitutional liberty was established in England, the monarch claimed, and often exercised, the power of arbitrary arrest and imprisonment; and, during the reigns of the Tudors and the Stuarts, it was held by some judges that "although the king could make no laws but by common consent in Parliament, yet, in time of war, by reason of the necessity of it to guard against dangers that often arise, he useth absolute power, so that his word is law." Indeed, it was asserted, even in Parliament, on behalf of Elizabeth, that the Queen inherited both an enlarging and a restraining power: by her prerogative, she might set at liberty what was restrained by statute, or otherwise; and by her prerogative she might restrain what was otherwise at liberty: that the royal prerogative was not to be canvassed, nor disputed, nor examined, and did not even admit of limitation; and that absolute princes, such as the sovereigns of England, were a species of divinity. It is shown from indisputable authority that, at least during the Tudor dynasty, "whenever there was any insurrection or public disorder, the Crown employed martial law; and it was, during that time, exercised not only over the soldiers, but over the whole people. Any one might be punished as a rebel, or an aider or abettor of rebellion, whom a provost-marshal or lieutenant of a county, or their deputies, pleased to suspect."

This power was employed by Queen Mary in defence of the old theology, and by Queen Elizabeth in defence of the new; and after the suppression of the northern rebellion, which agitated the kingdom during a portion of the reign of the latter princess, she severely rebuked the Earl of Essex because she had not heard of his having executed any criminals by martial law. In 1552, when there was no rebellion or insurrection, King Edward granted a commission of martial law, and empowered the commissioners to execute it in such a manner as should be thought by their discretion most necessary. Hume mentions numerous other instances of the exercise of this despotic power during the reign of Elizabeth. But the more general diffusion of knowledge and the progress of civilization, produced by the revival of learning, the invention of printing, and the discovery of the western hemisphere, aroused the people to a sense of their debased condition and the vindication of their ancient rights; and her successor, James I., found his claims of Divine right and unlimited prerogative frequently disputed. It was not, however, until the reign of his perfidious and unfortunate son, that any organized resistance was made to these claims. But, above every other invidious claim of prerogative, the power of arbitrary imprisonment was the most abhorrent to the nation. In the debates in and out of Parliament, while the committee were engaged in framing the Petition of Right, the inviolability of personal liberty was deemed paramount even to the right to life and property. "To bereave of his life a man not condemned by any legal trial," it was contended, "is so egregious an exercise of tyranny that it must at once shock the natural humanity of princes, and convey an alarm through the whole commonwealth." To confiscate a man's fortune, besides being a most atrocious act of violence, exposes the monarch so much to the imputation of avarice and rapacity, that it will seldom be attempted by any civilized government. But confinement, though a less striking, is no less severe a punishment, nor is there any spirit so erect and independent as not to be broken by the long continuance of the silent and inglorious sufferings of a prison." The power of imprisonment, therefore, it was maintained, being the most natural and potent engine of arbitrary power, it was absolutely necessary to remove it from a government which is free and legal.

These principles, on which was based the act known by the name of the Petition of Right, and which has been called the Second Great Charter of the liberties of England, were ratified by the king. He thus solemnly bound himself, among other things, never again to imprison any person, except in due course of law, and never again to subject civilians to the jurisdiction of courts-martial. How shamefully he violated this solemn covenant, and how ignominously he forfeited his life and his crown, as the righteous punishment of his perjury, is one of the saddest and gravest and most instructive records of history. His sons and successors, Charles II. and James II., particularly the latlatter, indifferent to or forgetful of the fate of their father, did not hesitate, when the occasion seemed to require, to violate the rights of their subjects, until James, at length, intimidated by the indignation of all classes of his people, struck with terror, saved himself from the death which he deserved, by timely flight, and ended his wicked and disgraceful career as a pensioner of France. His abdication ended the long struggle forever in favor of the exemption of the basest and humblest criminal from arbitrary imprisonment under any pretence, and constitutional liberty was established in England. In order to place it on principles impossible to be misunderstood or evaded, the Convention issued their declaration of right before the crown was offered to William and Mary. On these conditions it was thankfully accepted. The principles which the Convention reiterated were, indeed, as Macaulay says, engraven on the hearts of Englishmen during four hundred years: "That without the consent of the representatives of the nation," he continues, "no legislative act could be passed, no tax imposed, no regular soldiery kept up, that no man could be imprisoned, even for a day, by the arbitrary will of the sovereign; that no subordinate could plead the royal command as a justification for violating any right of the humblest subject, were held, both by whigs and tories, to be fundamental laws of the realm." But, despotic monarchs, under some plea of necessity, as we have seen, frequently disregarded those laws. The Declaration of Right, and the Mutiny Act passed soon after, put an end forever to any pretext on behalf of the Crown to deprive a civilian of his personal liberty, without some order, writ, precept, or process of some court of competent civil jurisdiction. It has never

been pretended, since the Declaration of Right was proclaimed, and the first Mutiny Act was passed, that any but members of the army and navy were subject to martial law or the Articles of War. It was conceded by all the counsel in Grant *a.* Gould (2 *H. Bl.*, 69), and reiterated by the court, that martial law could only be exercised in England, so far as it is authorized by the Mutiny Act and the Articles of War, which have cognizance only over the army and navy. Martial law, in the proper sense of the term, does not exist, and never has existed, in England since the Revolution. The Mutiny Act and the Articles of War, like the Military Code, &c., adopted by Congress, constitute what may more properly be called military law; and though they provide for courts-martial for the trial of military offenders, they are totally different from that kind of martial law which prevails in despotic countries, and which legally exists under constitutional governments only within the immediate theatre of war or insurrection. Undoubtedly, on some occasions the writ of habeas corpus has been suspended, but never without the consent of Parliament.

Now, is it possible that all the passages to which I have referred, in the constitutional history of England, and all the solemn and salutary warnings which they convey, were not engraven on the minds of the enlightened men who had the principal share in the formation and adoption of the present Constitution of the United States of America? Can it be supposed, for a moment, that any implied power, such as the defendant claims for the Presidential office in the present instance, would have been tolerated by those men? If they intended that a dictatorship should exist under any emergency, they would not leave it to the chief executive to assume it when he may, in his discretion, declare necessity requires it, but would at least provide that this necessity should be declared by Congress, and, as under the Constitution of ancient Rome, that the legislative power alone should select the person who should exercise it. That the President can, of his own accord, assume dictatorial power, under any pretext, is an extravagant assumption. The proposition cannot be entertained by any court; no such inquiry can arise under the Constitution of the United States; it does not reach to the proportions or stature of a question.

II. It is, however, maintained, if the President does not possess this power in his civil capacity, that he does possess it in his military capacity, as commander-in-chief of the army and navy of the United States. A commander of an army has, of course, within the sphere of his military operations against an enemy, all power necessary to insure their success. General Rosecrans had a right, I have no doubt, the other day to destroy all property which caused any obstacles to his operations against Bragg; and if he discovered any plots to mar those operations, or to give intelligence to the enemy, or to afford them any kind of aid or comfort, he would have a right to try the offenders, whether civilians or soldiers, by a court-martial. But his power does not extend beyond his lines. If a man at Cincinnati has a correspondence with Bragg, giving him intelligence of the plans of Rosecrans, the latter cannot have the offender arrested at Cincinnati, brought within his lines, and tried by a court-martial. This man is, indeed, emphatically a traitor; he is guilty of high treason against the United States of America; but he is to be tried by a civil tribunal, according to the course and practice of the established law, on a presentment or indictment of a grand-jury. His case has not arisen in the land or naval forces, or in the militia when in actual service in time of war or public danger (see fifth amendment of the Constitution). Although it indeed affects the operations of a certain portion of the land forces, it is not a military but a civil offence. Neither can even the commander-in-chief of the army extend martial law beyond the sphere of military operations. If he possessed this power, in time of war or insurrection, over the whole extent of the nation, whether within the theatre of military operations or not, the political institutions and laws of the land would be entirely at his mercy. A whiskey insurrection in Western Pennsylvania would authorize him to abrogate the law of liberty in Massachusetts, or any other State. Martial law would extend, at the mere pleasure of the commander-in-chief, over the whole length and breadth of the land. It is beyond controversy, as we have seen, that this power does not vest in Mr. Lincoln as President; but as a military commander he can possess no greater power than if he was not President, and was merely commander-in-chief of the army and navy. Suppose the Constitution vested the command in chief

of the army and navy in some person other than the President. Could this functionary subvert the Constitution and laws of the land on the plea of military necessity? Surely not; and if he could not do it, neither can the President, unless the Constitution has empowered him to do it in his civil capacity.

The opinion referred to by the counsel of the defendant, delivered by Chief-justice TANEY, in Luther *a.* Borden (7 *How.* (U. S.), 1), so far from sanctioning, makes no question of this extension of the military power of the President. An actual insurrection existed in the State of Rhode Island, and military measures to suppress this insurrection were in operation there, by the intervention of the Federal Government, on the application (I forget which) of the Legislature or executive of that State. That commonwealth was in a condition of intestine war; and there, as in Western Georgia and in Tennessee now, the officers engaged in the military service "might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection."

The formidable power, for which the defendant contends, is plainly not necessary to the safety of the nation, even if the Constitution conferred it when that safety should be endangered. Within the immediate theatre of insurrection or war, the commander-in-chief and his subordinates, where the exigencies of the occasion make it necessary, we repeat, do possess it; beyond it, the ordinary course of proceedings in courts of justice will be sufficient to punish any persons who furnish information or afford any aid or comfort to the enemy, or in any way are guilty of the detestable crime of betraying their country. In sudden emergencies, caused by invasion or insurrection, the power expressly given by the Constitution and the acts of Congress to repel the one and suppress the other, are ample and effective; and it requires no exercise of arbitrary power over the sacred rights of personal liberty to accomplish this purpose. It is as manifest as the day, it is beyond all controversy, that these rights, in war or in peace, during invasion or domestic violence, even during the hideous rebellion which now confronts us, are, except in the cases which I have stated, inviolable. The President, therefore, whether in his civil capacity or as commander-in-chief of the army and navy of the United States, has, unquestionably, no power to authorize the act of which

the plaintiff complains. The ground upon which this application is made has no color of right. It cannot, in my opinion, be entertained as a question in any State or United States court. The only questions in this action worthy of consideration, and which can be entertained, do not arise under the Constitution of the United States, but are fitly within the jurisdiction of this court.

The motion is denied, without costs.

From this decision the defendant appealed.

William C. Traphagen and *James T. Brady*, for the appellants.

E. R. Meade and *William F. Allen*, for the respondents.

By the Court.*—Leonard, J.—The question is not whether the fourth section of the Act of Congress, passed March 3, 1863, affords a valid defence to the action. The true question is this, Is it in the power of Congress to give the Circuit Court jurisdiction of the case?

The Constitution extends the judicial power of the Union to all cases in law and equity arising under the Constitution, laws, and treaties of the United States.

The defence, in this case, arises under the Act of Congress, and the validity of that act, considered in the light afforded by the Constitution, will be one of the principal subjects to be determined at the trial. It has been decided that a case arises, within the meaning of the Constitution, as well when the defendant seeks protection under a law of Congress, as when a plaintiff comes into court, to demand some right conferred by law.

It has been objected that the original jurisdiction of all actions may be drawn into the Federal Courts, by similar enactments of Congress, and that the case arises, within the meaning of the Constitution, only after a trial and judgment in this court, when the action can be transferred by writ of error or appeal, and brought before the Federal courts for review.

The power of transferring causes to the United States Circuit,

* Present, Leonard, P. J., Sutherland and Clerke, JJ.

in a similar manner, where the question involved was of an appellate and not original jurisdiction, has long been sustained.

Chief-justice Marshall says, in the case of Osborn *a.* United States Bank (9 *Wheat.*, 738, 821): "We perceive no ground on which the proposition can be maintained, that Congress is incapable of giving the Circuit Courts original jurisdiction, in any case to which the appellate jurisdiction extends."

Congress has enacted that the defendant may interpose in his defence the orders, &c., of the President, and has directed the transfer of cases involving such a defence, in the manner prescribed, into the Circuit Court.

According to the statements of the defendant, such a case has arisen. We have nothing to do with the validity of the law as a defence to the action. It is sufficient for the State court that the defence involves the construction and effect of a law of Congress. The case has then arisen when the courts of the United States may have jurisdiction, if Congress so directs. If the law does not afford a constitutional or valid defence, it cannot now be doubted that the learned justices of the United States courts will so declare it; when the jurisdiction of such cases will remain in the State courts, as before the enactment of the law. It is not our duty, therefore, to assert the independence of our State sovereignty and jurisdiction, for the final construction and effect of all acts of Congress may be brought before the United States courts by the express provisions of the Constitution. The manner of taking the cause to those courts is of no consequence. The Supreme Court of the Union must be relied on to prevent its jurisdiction from being unlawfully extended by Congress. I am of the opinion, therefore, that Congress has the power to direct the transfer of such cases.

In my opinion, this application was unnecessary in order to vest the United States Circuit Court with the possession of the action; but the discussion has not been lost, inasmuch as it will be now settled, that this court will not, in this judicial district, take further cognizance of cases which have been transferred under this Act of Congress. It is very proper that an order be entered transferring the cause to the United States Circuit, as it affords the evidence, in this court, of the disposition made of it.

In arriving at my conclusions, I have consulted *Story's Com. on the Constitution* (ch. 38, §§ 903, 906, &c.); Martin *a.* Hunter (1

Wheat., 304, 358); Cohen *a.* State of Virginia (6 *Ib.*, 264); Osborn *a.* United States Bank (9 *Ib.*, 738).

As a rule of practice, I think the court should not approve any sureties, unless the amount of the bond is equal to the sum in which the defendant in the action has been held to bail, if bail has been required in the State court. This fact should be made to appear to the satisfaction of the judge to whom the bond is presented for approval.

The decision in this case will also embrace the case of Gudeman *a.* Wool, argued at the same general term as the present case.

The order appealed from should be reversed, and the motion below should be granted without costs.

Sutherland, J.—The question is not as to the constitutionality of the fourth section of the Act, declaring that the order or authority of the President, during the rebellion, shall be a defence, in all courts, to any action for any arrest, imprisonment, or act done, or omitted to be done, under or by color of the President's order, or of any law of Congress; but the question is, as to the constitutionality of the fifth section of the Act, authorizing the defendant in any such action to remove the same from the State court to the Circuit Court of the United States for the district where the suit is brought for trial, on complying with certain requirements specified in the section: that is, on entering his appearance, filing his petition stating the facts, offering good and sufficient surety, &c.

The question presented by this appeal is not as to the constitutional power of the President to order the arrest, imprisonment, &c., or as to the constitutional power of Congress to authorize the President to order the arrest, imprisonment, &c.; but the question presented by the appeal is, as to the constitutional power of Congress to give the Circuit Courts of the United States primary or original, and (as to the State courts) exclusive jurisdiction, of the trial of actions for such arrests, imprisonments, &c.

In determining the question as to the constitutionality of the fifth section of the act, we must assume, I think, that the trial of this action will involve the determination of the question as to the constitutionality of the fourth section; that Congress, in

passing the act, considered that the trials of the actions to be removed to the Circuit Courts of the United States under it, would involve the determination of the question as to the constitutionality of the fourth section, whether tried in the State or United States courts; and that Congress intended, by the fifth section, to take from the State courts and give to the Circuit Courts of the United States the right and power to determine that question.

Had Congress the constitutional power to do this? That is the question.

If Congress had the power, then the order appealed from, denying the defendant's motion to remove the action and all proceedings therein to the Circuit Court of the United States for the Southern District of New York, should be reversed, and, I think, an order made directing such removal: if Congress had not the power, then the order appealed from should be affirmed.

If no steps had been taken for the removal of the action from this court, and the action should be tried in this court, and the question as to the constitutionality of the fourth section of the Act should be decided adversely to the defendant by the Court of Appeals of this State, the Supreme Court of the United States would have final and conclusive appellate jurisdiction of the question. (*Const. U. S., art.* 3; § 25 *of the Judiciary Act*; 1 *Stat. at Large*, 85; Cohen *a.* State of Virginia, 6 *Wheat.*, 264; Miller *a.* Nicholls, 4 *Ib.*, 312.)

Cannot Congress give the Circuit Court of the United States original jurisdiction in any case to which this appellate jurisdiction extends?

In Osborn *a.* United States Bank, 9 *Wheat.*, 738, cited by Judge Leonard, Chief-justice Marshall said he could perceive no ground for saying that Congress could not.

In that case, one of the questions was, whether Congress could constitutionally confer on the Bank the right to sue and be sued "in every Circuit Court of the United States."

It was held that such a suit was a case arising under a law of the United States; consequently that it was within the judicial power of the United States, and Congress could confer upon the Circuit Court jurisdiction over it.

See also Curtis's Com. on the Jurisdiction, &c., of the Courts

of the United States, sections 12 and 13; the latter section containing a quotation from another portion (p. 865) of the opinion of Chief-justice Marshall in Osborn *a.* The Bank of the United States, apparently quite pertinent to the question in this case.

I concur, then, in the conclusion of Judge Leonard, that Congress had the power to direct the transfer to the Circuit Court of the United States.

Probably an order of this court directing such transfer is not absolutely necessary, but to make one would be in accordance with usage in like cases; and besides, such an order would be the best evidence of the determination of this court that it no longer had jurisdiction of the action.

It appearing that the defendant has complied with the requirements of the Act for such transfer, the order appealed from should be reversed, and an order made by this court for the removal of the action, and all proceedings therein, to the Circuit Court of the United States.

Clerke, J.—I see nothing whatever in the arguments of my brethren, or in those of other judges on the same subject, to induce me to recede from the position which I have attempted to maintain at special term. They have all alike, in my very humble judgment, unaccountably overlooked the only point claiming consideration on this great constitutional subject.

According to the doctrine upheld by my brethren, we can scarcely conceive of any act committed by any officer of the General Government under color of any authority derived from or under the President, which may not constitute a genuine, veritable case, arising under the Constitution of the United States, and which, therefore, may not rightly come within the cognizance of their judicial power. It is only necessary to claim that it was committed under color of that authority, and was, therefore, justified by the Constitution, however monstrous and appalling the act may be, to make it, according to this doctrine, a case arising under that Constitution. For, of course, according to the terms of the claim, the claimant appeals, through this remarkable statute, to the Constitution for his justification, and, however palpably frivolous such a claim may be, however palpably manifest may be the conviction that the Constitution no more sanctions such an act, than it sanctions the burning of

the Capitol, the dispersion of Congress, and the shooting, imprisonment or exile of the men of whom it is composed, yet it is claimed to present a question, and, therefore, a case arising under the great charter of Constitutional Liberty in America, the perpetrator of the outrage making that a question which is unquestionably no question; and the judicial power of the State is ousted of its legitimate jurisdiction. Thus, this extraordinary statute prescribes not only that the character, but the mere assertion, of the wrong-doer shall determine jurisdiction, and that the subject-matter, which has been always held, except in cases affecting ambassadors, other diplomatic ministers and consuls, as alone the criterion of jurisdiction, shall be excluded from consideration. Surely, if this can be done by Congress, the Government of the United States of America is not, as all men have heretofore supposed, incontestably a government of limited powers and duties, and is, if not one of unlimited powers and duties, nevertheless, of very accommodating expansibility. This is a novel and strange theory of development in America.

But, it is asserted, as the appellate power of the Supreme Court of the United States extends in certain cases to State tribunals, that this case would, after judgment, reach the Federal jurisdiction, and that, therefore, it may as well be transferred to the United States Circuit Court before judgment. Even if the Supreme Court of the United States would entertain such a case on appeal, this is no controlling reason why it should, necessarily, be transferred to the United States Circuit for adjudication in the first instance. For, the only question to be determined by us on this motion is, whether Congress has the power to transfer cases of this description to the Circuit Court of the United States; not whether, ultimately, it may reach the appellate jurisdiction of the United States Supreme Court. The Act of Congress, passed in 1789, "to establish the judicial courts of the United States," no doubt provides that a final judgment or decree in any suit in the highest court of law or equity of a State, where is drawn in question the validity of a statute of the United States, and the decision is against its validity, may be re-examined and reversed or affirmed in the Supreme Court of the United States. But, if it is too clear for controversy that the statute is an outrage on the Constitution,

if it is palpably usurpation, if it is plain to the most unlettered citizen, that the statute is an attempt to subvert all the securities which the founders of the government have provided for the preservation of personal liberty, and to invest one man with unlimited dictatorial power, and, therefore, that the appeal was palpably frivolous, I presume the court would hear no argument on such an appeal, and would forthwith affirm the judgment or dismiss the writ. Would they, for instance, hearken to an appeal involving the validity of an Act of Congress giving the President, or any other member of the government, power, by a *coup d'état*, to extinguish the legislative branch, as Cromwell did the Long Parliament, and substitute a Barebones Legislature in its place? Surely not; if they, too, were not struck down, and were not (if such debasement can be imagined) by force, by fear, or by corrupt appliances or selfish aspirations robbed of independence. So that the consideration, whether the act is not palpably void, must present itself on appeal as it now presents itself to us on this motion; and, if it is palpably void, I repeat, it would not be treated on appeal as worthy of being for a moment entertained. I still consider the defence in this case just as destitute of color as the case which I have imagined. Whether, under the pretext of authority from the President of the United States, any one citizen, at his mere will and pleasure, without any intervention of the judicial tribunals, can incarcerate another citizen not subject to military law, in a loathsome dungeon, for many months, or for a day or an hour, cannot, under any circumstances in which the nation may be placed, be treated as a question constituting a case arising under the Constitution; and any statute which declares the contrary is palpably void.

The order at special term should be affirmed with costs.

Order reversed.

THE PEOPLE *on rel.* JOHNSON *a.* ERBERT.

Supreme Court, First District; General Term, February, 1864.

Habeas Corpus.—Custody of Child.

The Supreme Court of this State, like the former Court of Chancery, exercises a general control over all minors.

This power is for the benefit of the child, and is not to be defeated by one having a mere legal title to the custody of the child, whether that title or right arise from a natural relationship or from an act of law.*

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* The later cases on this subject have gone far to qualify the old rule, by which the father was said to have an absolute right, superior to that of the mother, and all others. The question is ably discussed in the matter of Gregg (5 *N. Y. Leg. Obs.*, 265), and put upon the ground, now more generally recognized, that the interest of the child is the paramount consideration.

The following decisions at chambers in the Supreme Court, in the First District, which have not been reported, further illustrate the general subject.

The People *on rel.* Frederica M. Neidlinger *a.* Mary Lohman, commonly called Madam Restell. (*April*, 1858.)

Clerke, J.—The writ of habeas corpus was issued in this case, requiring the defendant to produce before the court the infant child of the relator, alleged to be unlawfully detained, or to have been unlawfully disposed of by the said defendant.

The relator, an unmarried woman, was delivered of a male child on the 30th of August, 1855, at the house of the defendant, who styles herself, in the return to this writ, to be a midwife and female physician. Almost immediately after the delivery the child was taken from the relator by the defendant, and since that time the mother has never seen him. In the return, the defendant denied that she had the child in her custody, or under her power, or that she detains him, or ever did detain him. She also alleges that the relator solicited her to procure some person who would adopt the child, and that accordingly, on the day of the accouchement, the relator freely and voluntarily surrendered him to one Mrs. Wright, with a request that he should be given to the lady who had expressed a desire to adopt him, and that he was soon after disposed of and given away for adoption.

The court, in the first instance, on the 8th of January, 1857, after the return, thought proper to send the case to a referee, to report whether the said child was at any time in the possession or under the control of the defendant, and whether the defendant parted with the custody of the child; and if so, to whom, and under what authority she disposed of him; and if the defendant knew, or had any means of knowing, in whose custody the child then was.

A subsequent order, bearing date January 24, 1857, was substituted in the place of the order of the 8th of January, somewhat modifying the previous order,

Where a father has voluntarily suffered the custody of his children to be committed, by indentures, to third persons, upon whom the indentures are binding, the court will not restore them to him unless it is for the benefit of the children to do so.

In 1860 the wife of Mr. Johnson, the relator, died, leaving him three children, aged eight, six, and five years. In April,

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and directing the referee to report whether the child was in the custody of the defendant, or under her power or restraint; or if not, whether he had been transferred to another; and if so, at what time, for what cause, and by what authority the transfer took place, and whether said transfer, if any, was made by the consent of petitioner, and at her request. This order also directed the referee to append to his report the testimony which should be taken before him in this proceeding.

The referee now reports, from the proofs and allegations taken and made before him, that the child was in the possession and under the control of the defendant in the month of August, 1855; that, although there was some evidence before him that the relator was willing or was induced to part with the child, yet, he states, there was no evidence to show what really became of him after he had passed into the hands of the defendant, and that she did not show what she had done with the child, or what ultimately became of it. He consequently reports, as his conclusion, that the defendant has not parted with the child, and that the defendant is responsible to this court for the same.

I think that this report is plainly justified by the testimony, although the question whether the relator was willing or was induced to part with the child—in other words, whether she consented that any person should adopt him—has no pertinency to the questions properly and legally involved on this inquiry; except, perhaps, so far as to assist the court in determining hereafter, if the child should be produced, whether the mother was a competent person to have the care of him. For, it may with some plausibility be affirmed, that a mother who was willing and even anxious to part with her infant immediately after his birth, must be destitute of that affection without which no person is capable of suitably rearing and bringing up a child. As far as the defendant is concerned, she cannot avail herself of such an allegation. A child cannot be disposed of or alienated like a chattel. A father, even, cannot contract away the custody of his legitimate children. As Mr. Justice Cowen remarks, in The People *a.* Mercein (3 *Hill*, 399, 411), "Those countries in which a father has a general power to dispose of his children, have always been considered barbarous. Our own law has never allowed the exercise of such a power, except for some specific and temporary purpose—such as apprenticeship during the father's life, or guardianship after his death."

The only questions now to be considered, therefore, are whether the child was at any time in the possession or under the control of the defendant; and if so, whether the defendant has parted with said child.

We have seen that the referee has reported that he was in the possession and under the control of the defendant in the month of August, 1855. She has entirely failed to give any satisfactory account of what has become of him since that time. Our statute declares that it is not enough for the person upon whom this writ shall have been duly served (2 *Rev. Stat.*, 566, § 32), to state

1861, he left the children with Mr. Erbert, the defendant, promising to pay him $12 per month for the support of the two boys, and allowing him to adopt the third one, Anna, till such time as he could obtain the means to support them him-

"whether he have or have not the party in his custody, or under his power or restraint." "If he shall have had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause, and by what authority such transfer took place."

Assuming, therefore, as I do, that the defendant had this child in her power and custody on the 30th day of August, 1855, which I hold to be a fact fully established in this case, and which she can no longer gainsay, she must make a further return under oath, full and explicit; and if she still insist that she has not the child now in her power and custody, and if she has transferred him to some other person, as is alleged, for adoption, she must specify particularly to whom, at what time, for what cause, and by what authority such transfer took place.

I will give her ten days from the service of the order to be entered on this decision to make this further return, in failure of which it will be my duty, pursuant to section 36 of the statute already mentioned (2 *Rev. Stat.*, 566), to issue an attachment against her, commanding the sheriff to apprehend her, and bring her before this court.

In the Matter of the Petition of Catharine Lesslier. (*September*, 1858.)

Ingraham, J.—The evidence in this case discloses a state of facts in regard to the child of the petitioner which has rendered it extremely difficult to arrive at a satisfactory conclusion and decision. The petitioner, while unmarried, became the mother of the child, and at the age of six months she agreed to bind the child to the respondents, for the purpose of carrying out an agreement entered into by her to give the child to them. An instrument was executed by which the child was bound to one of the respondents, to be adopted by them as their child. The child was placed in their possession, and has since been supported, and clothed, and educated by the defendants in a suitable manner as their own child, and, the evidence shows, in a manner calculated to give him a good education. From that time the mother has in no way aided in the support or care of the child, not even so much as seeing him or inquiring as to his welfare. For eleven years the respondents have acted towards the child as his parents, and claim now to be attached to him as an adopted child to whom they propose to give their property. During the greater part of this time the mother was leading an abandoned life. From her own statement, and that of her husband, she has reformed, and during the last five years she has been a member of a church. The mother of a child having no known father is undoubtedly entitled to the custody of it. She is its only parent, and is alone bound for its support, and if this was the only question in the case I should have no hesitation in ordering the child to be delivered to its parent. The indenture signed on behalf of the child, so far as it purports to come from the commissioners of the almshouse, is not

self. In March, 1862, at the instance of Erbert, who claimed that the father had neglected to perform his agreement, Justice Welsh, a police justice of the city of New York, committed the children to the care of the commissioners of charities and

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valid, inasmuch as it is not executed in conformity to the provisions of the statute. Nor is it binding upon the infant as indentures of apprenticeship. It purports to be a binding for the purpose of adoption of a child; no such binding is authorized by our laws, and if the infant sought to avoid it, I am of the opinion that it would give the respondents no right to reclaim him against his will. In addition to the binding by the almshouse commissioners, is the consent of the mother to this contract with the respondents, for the clothing, board, and education of the child until he arrives at the age of twenty-one years. Under such circumstances there is no hardship in saying that the interest of the infant should be the first consideration in the decision of this case. The abstract right of the mother to the child may be thus waived by her own agreement; and unless it appears manifestly for the interest of the infant to take the child from the respondents and deliver it to the mother, the duty of the court would be discharged by merely inquiring whether there was any improper restraint, and if there was any, by discharging the child therefrom. I have less hesitation in such a conclusion, when I consider that the mother has never shown any regard or affection for the child since it was six months old, but has left the whole burden and expense of its support and education to the respondent. A case similar to the present was that of the McDowles, (8 *Johns.*, 328), where the children, aged eight and eleven years, were bound to one of the society of Shakers, to be brought up in their faith. The court there says: "The infant is not bound by the indenture, but the question is as to the relief which ought to be granted. There is nothing to show any improper treatment of the infants, and that the party to whom the father intended to bind them has not faithfully performed the stipulations in the indenture. This is not a case in which the father has any equity or any right to complain. He may be bound by the indenture though the infant is not." These remarks may very appropriately be applied to the present case, so as to leave the disposition of it to rest entirely upon what shall be deemed most for the welfare of the child. Upon this question, however, there is some considerable difficulty. If the respondents continue in the same course of life that the evidence shows to have existed for years past, their house is not a proper place to bring up this child. The statements made on their behalf, like those on the part of the mother, are that they have abandoned such immoral courses, and have also reformed. It appears that the suggestion of the respondents' counsel would, under all the circumstances, be most for the benefit of the infant, if any satisfactory arrangement can be made to secure that result. That suggestion is, to place the child in a suitable boarding-school at the expense of the respondents. In the Matter of Waldron (13 *Johns.*, 418), Chief-justice Thompson says: "In cases of writs of habeas corpus directed to private persons to bring up infants, the court is bound to set the infant free from an improper restraint, but they are not bound to deliver the infants over to any particular person. This must be left to their discretion, according to circumstances that shall appear before them." From the examination of the child it is apparent that he is under no restraint from which he desires to be relieved; but that he wishes to remain with the respondent. It is proper to add that this application was returnable before me, and not before

correction, who indentured them out to Mr. and Mrs. Erbert. Meanwhile Johnson was keeping a saloon in Chicago.

Johnson applied to Mr. Justice Gould for a habeas corpus to obtain the custody of the children. After hearing the case, the

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the court, and, as in the case last referred to, it would have been more properly made to the court where the equity powers of the court could give more suitable directions as to the care and custody of the child than can be ordered by a judge in this proceeding. For the purpose of enabling the respondents to carry out the suggestion above mentioned, I shall make no order to deliver the child to the petitioner, but I direct this matter to be adjourned to the second Monday of October, at 10 A.M., before me. In the mean time the respondent must make suitable provision for the child at a suitable boarding-school, so that it may then appear that the interests and welfare of the child will be best promoted by leaving him under their charge. If no such arrangement is made before that time, the petitioner may renew this motion on the adjourned day.

In the MATTER OF THE PETITION OF EMMA J. ROBINSON AND OTHERS, INFANT CHILDREN OF REUBEN B. ROBINSON. (*July*, 1859.)

In 1853, Reuben B. Robinson was divorced from his wife, on the ground of adultery committed by the husband. The custody of the children was given to the mother, and the sum of $200 was ordered to be paid to her for the support of each of them during minority. The mother having deceased, the children now petitioned the court for the appointment of a trustee, to receive and pay over the moneys which would have been paid to the mother for their support.

This was opposed by the father, on the ground that the order of the court expired with the death of the mother. He stated that he was willing to support the children at his own house, and claimed that he was entitled to their custody.

Held, that so long as the mother lived the judgment operated to give her the custody of the children, and to compel the father to provide her with the means for their support. Beyond that period the judgment ceases to have any effect. The father's rights over the children being restored, as he is bound to provide for all their wants, he is also entitled to their care and custody. The statute also shows that the petitioners are in error in supposing that a trust was created by the judgment of divorce, which continued for the benefit of the children after their mother's death. By the provisions of the Revised Statutes in regard to such payments (2 *Rev. Stat.*, 148, § 58), the provision for the children is to be made by an order, or between the parties. The order or judgment is only to be between the parties—husband and wife. When that relation is terminated by the death of either, the object of the order and its vitality ceases, and the surviving party is restored to his or her natural rights.

The prayer of the petitioners is denied.

In the MATTER OF MARY JANE MCKAIN, AN INFANT, &c. (*April*, 1863.)

LEONARD, J.—The office of this writ of habeas corpus is to liberate the person of a child when restrained of its liberty or unlawfully detained. When the child is of very tender age, as in the present case, it is the duty of the court to deter-

judge remanded the children to Mr. and Mrs. Erbert, rendering the following opinion, July 1, 1863.

Gould, J.—In the view I take of this matter, it is not necessary for me to pass upon the legality of the indentures, any further than to hold that, as far as the respondent Erbert is concerned, they are voluntarily and legally entered into, and that he cannot, now or ever, be allowed to question their validity, or evade his responsibility under them.

This being so, and there being thus legally secured to these children a home, where, the evidence shows, they can be, and in all human probability will be, well provided for, and kindly and carefully brought up to some reputable mode of life, the case is one to be considered under the general equitable powers of this court. This court, like the former Court of Chancery, exercises a general care and custody over all minors, and "this power is for the benefit of the child, and is not to be defeated by one having a mere legal title to the custody of the child," whether that title (or right) arise from a natural relationship, or from an act of the law.

As to the daughter Anna, while the relator, in terms, denies that he gave her to the respondent, to be by him and his wife adopted as their own child, he does not state how, or upon what terms, he did leave her with Erbert, although he does state that he left the boys there, upon an agreement to pay for their board. This failure to give any affirmative version, on his part,

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mine for the child when it is restrained of its liberty or unlawfully detained. The court, in such cases, must be guided by the true interests of the infant, in respect to its nurture, education, sex, and associations. The court should decide as the infant would, if possessed of the discretion to determine rightly and truly for herself. In the present case the child is a female. The mother has associates, at times, improper for the correct rearing of a daughter. The grandmother, who has the custody of the child at present, has the advantages of virtuous associations for the child, and is willing and desirous to continue the charge which she has voluntarily and affectionately assumed over her little granddaughter for the last five years.

In my opinion, I should greatly err if I held that the child is restrained of her liberty or unlawfully detained. The mother must, however, be permitted to visit the child once a week in the daytime, at the house of the grandmother, at such hour of the day as the grandmother may appoint, having proper reference also to the convenience of the mother.

The writ is therefore discharged, and the child is continued in the custody of the grandmother.

of the way in which she was committed to Erbert's care, is strong ground for believing the latter's statement on that subject, and the testimony of Birdsall renders it entirely clear that the relator, on this point, has sworn to what is false. And as he has thus done, in a very material point, he can hardly claim to be credited on any other matter.

The evidence of the servant girls is not of the most credible or creditable kind, to be sure; but it is supported by the confessions, or rather statements, of the relator to Birdsall; and it is not specifically contradicted by the relator, or on his behalf. This evidence shows him to be any thing but a fit custodian for these young children.

Further, it is in evidence that he remains indebted to a large amount, according to the showing of the assignment, and the proof that the assigned property, when properly applied, would not pay more than one-fifth of the debts enumerated in the schedule; and as against this, there is nothing but his general, unsupported statement that he is of ability to take proper care of these children. Any statement he may make requires corroboration; and the fact that he is the keeper of a drinking-saloon in Chicago, is not the best kind of supporting evidence, any more than it is evidence that the place to which he would take the children is a proper one for their mental or moral training.

It is stated that the relator has now married a second wife, who has two children of her own, and is thus in a condition to take proper care of these young children. Of this wife, the court has this knowledge: that during the pendency of this proceeding, and while the law was the real custodian of the children, she did, in disregard of the action of the court, and to defy its control, by fraud and force possess herself of one of the children. This can hardly be deemed a very high recommendation of her as a fit guardian of their tender years, and certainly does not call upon the court to exercise its authority in her favor, she certainly having neither natural nor legal right to the custody of these children, and probably having no special affection for them. The court should hesitate long before committing them to her.

On the other hand, there seems no room to doubt that the respondent and his wife are really fond of the children, are

treating them as if they were their own, and are willing, as well as able, to nurture them kindly and bring them up reputably. Indeed, there seems no motive, other than affection for the children, to induce this respondent to have kept them so long, to have assumed by the indentures the obligation to continue the care of them, and to defend this proceeding. And as the children are conceded to be attached to him and his wife, and to be satisfied with their situation, and to prefer not to live with the relator, there seems no reason why the court should interfere with a custody lawfully acquired.

The children are remanded to the care and custody of the respondent.

The relator then obtained a writ of certiorari, to bring the matter before the court at general term for review.

Ira D. Warren, for the relator, insisted—I. That the indentures were void, because the children were not within the "Act to Provide for the Care and Instruction of Idle and Truant Children," under which the commitment and indentures were made.

II. That the gift of the custody of Anna was void as an agreement, and as a delegation of power it was revocable.

III. That the right of a father to the custody of the children is superior to that of any stranger.

Wakeman & Latting, for the defendants.

By the Court.*—Sutherland, J.—We are all of the opinion that the proceedings before the justice on the habeas corpus, and his final order therein, as to the children, should be affirmed,—that no sufficient reasons have been shown for reversing the order which he made, in the exercise of a discretionary power.

Order affirmed.

* Present, Leonard, P. J., Clerke and Sutherland, JJ.

SAVAGE *a.* COCK.

Supreme Court, Second District; General Term, March, 1864.

APPEALS FROM JUSTICE'S COURT.—NEW TRIAL.—AMENDMENT OF PLEADINGS.

Where a new trial is had in the County Court on appeal from a justice's judgment, upon an issue of fact, under section 366 of the Code, the parties are restricted to proofs under the issue raised in the justice's court.

Thus, on such a new trial, the County Court have not power to allow the defendant to amend his answer by pleading a new defence.

Appeal from a judgment of the County Court reversing the judgment of a justice's court.

This action, brought by James Savage and another, against Edward Cock, was commenced in a justice's court in Queens county. The complaint was for manure sold and delivered to the defendant. The defendant's answer consisted of a general denial of the allegations of the complaint. The plaintiff obtained judgment against the defendant for $121.70, damages and costs. From this judgment the defendant appealed to the County Court of Queens county. Upon the trial in the County Court, the defendant was allowed to amend his answer, by pleading payment. Judgment was rendered in the County Court in favor of the defendant, and from this the plaintiff appealed to the general term of the Supreme Court.

John J. Armstrong, for the appellants.—I. The County Court erred in allowing the defendant to amend his answer at the trial by interposing a new defence. 1. The appeal is to be heard upon the original papers. (§ 365.) 2. The issue of fact to be tried in the County Court, is the one brought into that court upon appeal. (§ 366, subd. 3 and 4.) 3. The power to amend the pleadings is not conferred upon the County Court, upon the trial of issues of fact on an appeal from the justice's court. 4. The amendment presented a new defence. The power to

amend at the trial is not given to the extent exercised in this case.

Benjamin W. Downing, for the respondent.

Scrugham, J.—This action originated in the justice's court, where the plaintiffs complained that the defendant was indebted to them in the sum of two hundred and sixteen dollars for manure sold to him by their assignors. The answer was a general denial, and judgment was rendered for the plaintiffs for $127.70, damages and costs. An appeal was taken to the County Court, and, on the trial there, the defendant was allowed to amend his answer so as to set up payment. This, we think, was error. The case was in the County Court on appeal, and the new trial, which the statute requires, is of the issues of fact joined in the justice's court. (*Code*, § 366, subd. 3.)

If this issue of payment had been presented in the justice's court, it is probable that the result there would have been the same as that afterwards reached in the County Court, and the plaintiffs would not have been subjected to the costs of an appeal.

Defendants should not be allowed to conceal their real defences and allow judgments to be taken against them in a justice's court, and, on appeal, present their true defences, and cast the costs upon the plaintiffs.

The judgment of the County Court should be reversed, and a new trial in that court should be ordered. Costs to abide the event.

Brown, P. J., and Lott, J., concurred.

CULVER *a.* HOLLISTER.

Supreme Court, First District; General Term, February, 1864.

EX-PARTE ORDER.—STAY OF PROCEEDINGS WITHOUT NOTICE.—IRREGULARITY.—INDEFINITE AND UNCERTAIN PLEADING.—FRAUD AND COLLUSION.—PLEADING EVIDENCE.

Where a motion is made to vacate an order, obtained *ex parte*, for irregularity in respect to the want of notice, and, on hearing the parties, the court declines to vacate the order, the defect, if any, is cured, and an appeal from the second order is not well taken. (SUTHERLAND, J., dissenting.)

On an appeal from an order requiring a pleading to be made more definite and certain, the proper method of suspending the operation of the order pending the appeal, is by a stay of proceedings, not by an extension of the time for an amendment.

An answer, alleging that a judgment relied on by the plaintiff was obtained by fraud and collusion between parties named, is sufficiently definite and certain, without specifying the acts which show fraud and collusion.

I.—Appeal from an order denying a motion to set aside an order extending time to answer for irregularity.

This action was brought by John P. Culver against David M. Hollister and another, upon an undertaking given by defendants as sureties on an appeal: the appeal had been determined in favor of the respondent in the action in which the undertaking was given. The answer set up that the affirmance had been obtained by fraud and collusion between the parties. The plaintiff moved to require the answer to be made more definite and certain, by specifying the acts of collusion and fraud relied upon. The motion was granted, and ten days was allowed to enable the defendant to amend his answer in these respects. The defendant, however, appealed from this order, and, after his time to answer had expired, obtained from a justice of the court at chambers an order *ex parte*, extending the time to amend the answer until ten days after the determination

of the appeal. This order plaintiff moved to set aside for irregularity. Mr. Justice Clerke denied the motion, with the following opinion.

Clerke, J.—The order which is sought to be set aside, is not an ordinary order staying proceedings until an appeal from an order shall be decided. It merely suspends the operation of the order appealed from, until the decision of the general term. Such an order the court may, if it think fit, make without requiring notice to the other party. Even on an appeal from a judgment to the general term, the court may grant a stay without notice. (Steam Nav. Co. *a.* Weed, 8 *How. Pr.*, 49.) To be sure, the judge, in that case, said that a judge out of court could not do this, but I think he could do it in regard to an order. At all events, as there is no distinction in this district between an order granted at chambers and an order granted at special term, I shall deem the order sought to be set aside in this case, as an order of the court; and, if necessary, the form of the order may be amended, so as to make it appear on its face as an order of the court.

Motion denied, without costs.

The plaintiff appealed.

J. W. & W. W. Culver, for the appellant.—I. A justice of the Supreme Court, like any other officer, when acting out of court, is an officer of limited jurisdiction. He may do just what the Legislature has authorized him to do; and whatever he does more than this, is done without jurisdiction. (Bangs *a.* Selden, 13 *How. Pr.*, 374; Clark *a.* Judson, 2 *Barb.*, 90.)

II. Any judge, anywhere, may make an order out of the court, and without notice, staying the proceedings in an action, to enable a party to apply for some ulterior relief, provided the time shall not exceed twenty days; but if the stay goes beyond that limit, the order is void. The judge has transcended his jurisdiction. (Bangs *a.* Selden, 13 *How. Pr.*, 374; Wood *a.* Kimball, 18 *Ib.*, 163.)

III. The Legislature never intended to impose upon the judges the duty, or confer the right, to review at chambers each other's *ex-parte* orders. (Cayuga County Bank *a.* Warfield, 13

How. Pr., 439; Hart *a.* Butterfield, 3 *Hill*, 455; Ryle *a.* Harrington, 14 *How. Pr.*, 59; *Code*, § 255.)

IV. The time to comply with the order having expired, a judge, or the court, had no power to open the default except upon notice to the opposite party.

Bogardus & Brown, for the respondent.—The right to extend the time in this case, is expressly given by section 405 of the Code.

Leonard, J.—This appeal is from an order denying a motion to vacate an *ex-parte* order extending the time to answer, after the appeal was taken, until ten days after the hearing and decision of an appeal from an order directing the defendant's answer herein to be made more definite and certain.

Conceding that the order made, *ex parte*, extending the time to answer after a decision at special term directing an answer to be made more definite and certain in ten days, and on expiration of that period, was irregular, it does not follow that the order denying the motion at a special term, made on notice, when both parties were before the court, to vacate the *ex-parte* order, was not properly made.

The order denying the plaintiff's motion amounted to a stay of proceedings merely till the appeal was heard. This motion was heard and decided at special term, when both parties were before the court on notice; and the judge had jurisdiction to grant a stay of proceedings, which would have the same effect only as the order appealed from. (9 *Abbotts' Pr.*, 419.) If the order directing the answer to be made more definite and certain should be affirmed, the general term could, and on request would, regulate the further time, if any, which should be granted to the defendant within which to comply with the terms of the order. If the order should be reversed, then no further time to answer would be required, as the answer already served would put the cause at issue.

I have looked into the answer referred to, and do not consider it clear, by any means, that it is insufficient, or requires to be made more definite.

I think the order appealed from here should be modified, so as to direct a stay of proceedings, on the part of the plaintiff,

till the decision of the appeal from the order in relation to the answer. Ten dollars, costs of the appeal, to abide the final result of the action.

CLERKE, J., concurred.

SUTHERLAND, J.—The order served on the plaintiff's attorneys on the 27th of October, extending time to serve amended answer ten days, was, I think, irregular, and would have been without force, even had it been served before the expiration of the time fixed by the original order for serving the amended answer. I infer from the papers that such order, extending the time to serve an amended answer, was made *ex parte*, and out of court. The original order, giving the defendant ten days to serve an amended answer, was a part of the decision or order made at special term, on the motion of the plaintiff, that the defendant make his answer more definite and certain; and I do not think that the time thus fixed by the order, as part of the decision of the justice who heard the motion on notice, could regularly be extended by another justice, *ex parte* and out of court.

But perhaps the question of the regularity of the order served on the 27th of October, extending the time to serve an amended answer, is not presented by this appeal. The appeal is from the order of the 19th of November, denying the plaintiff's motion to vacate the *ex-parte* order of the 10th of November, giving the defendant until ten days after the decision of the general term, on the appeal of the defendant from the original order of the 14th of October, requiring him to make his answer more definite and certain as to certain particulars specified in it, and giving him ten days within which to serve the amended answer.

Perhaps, then, the only question in the case is as to the regularity of the order of the 10th of November.

The case of Wood *a.* Kimball (9 *Abbotts' Pr.*, 419; S. C., 18 *How. Pr.*, 163), and the cases there cited, clearly show that the order of the 10th of November was irregular, and should have been set aside.

The order having been made *ex parte*, and out of court, I doubt whether even the justice that made it could, in deciding the motion made before him to vacate it, deem it to be the

order of the court, or cure its irregularity and give force to it, by considering it as amended, so as to purport to have been made by the court.

I think the order appealed from should be reversed, with $10 costs, and that the order of the 10th of November should be vacated.

Order affirmed.

II.—Appeal from an order requiring the answer to be made more definite and certain.

The facts are already above stated: both appeals came on for hearing at the same term.

Bogardus & Brown, for the appellant.—The answer sets up a perfect defence, if proved. It alleges, not conclusions, but facts. The motion was in the nature of a special demurrer. The answer is not so indefinite and uncertain that the precise nature of the charge is not apparent. (*Code*, § 160; Ward *a.* Dewey, 12 *How. Pr.*, 196.) We are required by the Code to plead facts; by the order appealed from, we are required to plead the evidence of facts.

J. W. & W. W. Culver, for the respondent.

Sutherland, J.—If the defendant's answer was defective in not setting out the facts showing the collusion and fraud alleged in the answer, I am of the opinion that the plaintiff's remedy was by demurrer, not by motion that the answer be made more definite and certain.

The allegation of collusion and fraud in the answer was certain and definite. It can hardly be said that the amendment, required by the order appealed from, tended to make the charge or allegation of collusion and fraud more definite or certain, by requiring the defendant to state the facts generally, showing the fraud or collusion.

I do not mean to intimate an opinion that the answer would be held bad on demurrer, because it does not state the facts

showing the collusion and fraud. It is not necessary to express an opinion on that question.

In my opinion, the order should be reversed, with $10 costs.

LEONARD and CLERKE, JJ., concurred.

GURNEY *a.* SHARP.

New York Common Pleas; Special Term, April, 1864.

APPEAL.—MOTION FOR NEW TRIAL AFTER JUDGMENT.—CASE.—ORDER NUNC PRO TUNC.

Where, after an appeal has been taken from a judgment, a case is made and settled, and the parties appear to argue the appeal upon the case, no objection for irregularity being taken, leave will be given to enter *nunc pro tunc* an order refusing a new trial.

Motion by defendant for an order *nunc pro tunc* denying a new trial, or for an order attaching case to the judgment-roll.

The action was brought by Richard C. Gurney against William J. Sharp, and was tried before Mr. Justice Brady and a jury, November 12, 1863, and a verdict rendered by jury, for plaintiff, for $420. On November 17, 1863, judgment absolute was perfected by plaintiff. After the judgment was perfected, defendant served notice and perfected an appeal to the general term. A case was afterwards made and settled. Both parties noticed appeal for argument at the April general term, 1864, at which term the argument of the appeal was set down for the second week. After the cause was set down, and before argument, the defendant made this motion.

William J. Huff, for the motion.

Joseph Larocque, opposed.

BRADY, J.—The parties to this action, by their respective

counsel, having attended to argue the appeal taken, on the case made, and no notice of any irregularity having been given, I think that the order denying a new trial at special term should be entered *nunc pro tunc;* but with the proviso that the appeal herein shall be argued when called at the present term, and that the plaintiff have $10 costs of this motion, to abide the event of the appeal;—the appeal to be heard upon the case already served, so that no delay may take place.

Ordered accordingly.

HENRY *a.* HENRY.

New York Superior Court; At Chambers, April, 1864.

Counter-claim.—Absolute and Limited Divorce.—Joinder of Causes of Action.

In an action not upon contract, a counter-claim which does not arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or which is not connected with the subject of the action, is inadmissible.

In an action for a limited divorce, on the ground of cruelty, the defendant is not at liberty to set up the adultery of the plaintiff either as a defence or as a counter-claim.

A claim for an absolute divorce cannot be tried in the same action with a claim for a limited divorce.

Motion for leave to serve supplemental answer.

This was an action by Jane Henry against James Henry for a limited divorce, on the ground of cruelty. The defendant, after having answered, alleging the like conduct on the part of the plaintiff, now moved for leave to serve a supplemental answer, setting up adultery on her part, and asking an absolute divorce by way of counter-claim.

Charles S. Spencer, for the motion.

John N. Lewis, opposed.—In this action, a plea of adultery, after the acts of cruelty complained of, is not admissible either

as a defence or counter-claim. 1. It cannot be a counter-claim, because it is not part of the transaction alleged in the complaint, nor connected with the subject of the action—to wit, the cruel treatment alleged. (*Code*, § 150; see Diddell *a.* Diddell, 3 *Abbotts' Pr.*, 167.) 2. It is not a defence, because it is neither a denial nor a justification. 3. Cruelty would not be pleadable either as a defence or counter-claim, in an action for divorce on the ground of adultery. (Griffin *a.* Griffin, 23 *How. Pr.*, 183; Diddell *a.* Diddell, 3 *Abbotts' Pr.*, 167.) 4. Cruelty and adultery cannot be joined in one complaint as grounds of divorce. (McIntosh *a.* McIntosh, 12 *How. Pr.*, 289; Rose *a.* Rose, 11 *Paige*, 166; Smith *a.* Smith, 4 *Ib.*, 92; Johnson *a.* Johnson, 6 *Johns. Ch.*, 163.) 5. There is but one precedent for such a motion as this, and that was denied on the ground that the remedy was by a cross-suit only. (Burdell *a.* Burdell, 2 *Barb.*, 473; S. C., 3 *How. Pr.*, 216.)

Robertson, C. J.—The charge of adultery, sought to be set up in the answer, may be a good subject for a separate action. It is not a counter-claim, because it does not arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (*Code*, § 150; Diddell *a.* Diddell, 3 *Abbotts' Pr.*, 167.) Nor is it a defence, because not connected with the acts of cruelty charged in the complaint. The kinds of relief asked for are entirely different, so that they cannot be joined in one action. (Johnson *a.* Johnson, 6 *Johns. Ch.*, 163; McIntosh *a.* McIntosh, 12 *How. Pr.*, 289.) And the entire incongruity of the causes of action would prevent their being tried in one action. (McNamara *a.* McNamara, 2 *Hill*, 547; S. C., 9 *Abbotts' Pr.*, 18.) And it has been so held in one case. (Burdell *a.* Burdell, 2 *Barb.*, 473; S. C., 3 *How. Pr.*, 216.) It is not necessary to notice other objections.

Motion denied, with $7 costs.

REYNOLDS *a.* THE PEOPLE.

Supreme Court, First District; General Term, February, 1864.

HOMICIDE.—DISPOSITION AND REPUTATION OF DECEASED.—REASONABLE APPREHENSION OF PERIL.—INDICTMENT.—UNCERTAINTY.—RETURN TO CERTIORARI.

It seems, that on a trial for murder, or manslaughter, evidence that deceased was notorious for acts of violence dangerous to life and limb, and that from the relations between the deceased and the prisoner such fact was known to the latter, is admissible.

But, where it did not appear that the character of the deceased was known to the prisoner,—*Held*, that evidence of the brutal, quarrelsome, and bloodthirsty disposition of the deceased, and of his reputation for violence, was properly excluded.

Where a prisoner had been convicted of manslaughter by a jury, under an indictment charging a wounding on the 6th February, 1862, and a death on the 14th February, and that, "on the day and year aforesaid," the prisoner did kill, &c., —*Held*, that the prisoner could not take advantage of the uncertainty in the indictment as to time.

A conviction will not be reversed on the ground that, in the return to the writ of certiorari, it merely appears that the jury was regularly impannelled, without the words "and sworn."

Certiorari to the New York General Sessions.

John Reynolds was convicted at the New York General Sessions of manslaughter in the third degree, in slaying Patrick Mathews. One of the justices of the Supreme Court certified, under the statute, that there was sufficient cause for staying proceedings, and the present certiorari was procured by the district attorney for the purpose of reviewing the conviction. At the trial, the prisoner's counsel introduced a witness and propounded the following question:

Q. Do you know what the character of Patrick Mathews was in this community for the ten years during which you knew him, as a dangerous, violent, quarrelsome man?

The question was objected to and excluded, and an exception taken.

The body of the indictment under which the conviction was had, was as follows:

"That John Reynolds, late of the Twenty-second ward of the city of New York, in the county of New York, aforesaid, on the sixth day of February, in the year of our Lord one thousand eight hundred and sixty-two, at the ward, city, and county aforesaid, with force and arms, in and upon one Patrick Mathews, in the peace of the people of the State then and there being, wilfully and feloniously did make an assault.

"And that he, the said John, with a certain knife, which he, the said John, in his right hand then and there had, and held the said knife in and upon the body of him the said Patrick, then and there wilfully and feloniously did beat, strike, stab, cut, and wound, thereby giving unto the said Patrick, then and there, with the knife aforesaid, in and upon the body of him, the said Patrick, one mortal wound, of the breadth of one inch, and of the depth of two inches, of which said mortal wound he, the said Patrick, at the ward, city, and county aforesaid, from the said sixth day of February, in the year aforesaid, until the fourteenth day of February, in the same year aforesaid, did languish, and languishing did live, and on which fourteenth day of February, in the year aforesaid, the said Patrick, at the ward, city, and county aforesaid, of the said mortal wound did die.

"And so the jurors aforesaid, upon their oath aforesaid, do say that he, the said John Reynolds, the said Patrick Mathews, in the manner and form, and by the means aforesaid, at the ward, city, and county aforesaid, on the day and the year aforesaid, wilfully and feloniously, did kill and slay, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity."

A portion of the return to the writ of certiorari was as follows:

"And the said defendant pleaded 'not guilty' to the indictment, and the trial of the said indictment was duly brought on at the said court, on the 12th day of October, 1862, before John T. Hoffman, Esquire, recorder of said city and county.

"After a jury had been regularly impannelled, the case was stated to the court and jury by the district attorney."

The foregoing facts are all that are deemed material, in view of the opinion of the court.

Sidney H. Stuart and *Charles S. Spencer*, for the prisoner.—I. The defence should have been allowed to show that the deceased was a dangerous and violent man, so notorious for his habits of attacking others with pistols and knives, as to be a terror to the entire community in which he lived. Since the adoption of the present rule, established in the case of Selfridge (see *Whart. Hom.*, 417), and followed in the case of Shorter *a.* People (2 *N. Y.* (2 *Comst.*), 193), that one, without himself assailing, may kill an assailant if the circumstances of the occasion reasonably inspire the belief that his life or limb is in danger, although it may afterwards turn out that the appearances were false, and there was, in fact, no peril whatever; a new and additional element of evidence—the character for violence of the assailing party, killed—has obtained. The rule now is, that if the slayer feels and believes, upon reasonable ground, that his life or person is in peril, he may destroy the source of that danger. Now, since a justification for such killing depends upon the fact of a belief of danger, and upon a reasonable ground for that belief, it is manifest enough that all such matters and circumstances as naturally tend to create an apprehension, and to show a reasonable ground for that apprehension, are legitimate matters and circumstances of evidence, and cannot be excluded from the jury, whose sole duty it is to find, first, whether the slayer was, in truth, in fear; and second, whether, in truth, there was reasonable ground for that fear. (State *a.* Tackett, 1 *Hawks.*, 210, 213; Queesenberry *a.* State, 3 *Stew. & Port.*, 308; Monroe *a.* State, 5 *Geo.*, 85; Keener *a.* State, 18 *Ib.*, 194, 220; Pritchett *a.* State, 22 *Ala.*, 39; Franklin *a.* State, 29 *Ib.*, 14; State *a.* Hicks, 27 *Mo.*, 588; Payne *a.* Commonwealth, 1 *Met.* (*Ky.*), 370; Rapp *a.* Commonwealth, 14 *B. Mon.*, 614.)

II. The indictment is vicious, for uncertainty in stating the time at which the affair is charged to have been committed. It is uncertain, from the face of the indictment, whether the prisoner "did kill and slay" the deceased on the sixth day or on the fourteenth day of February. The words "then and there," or "before-mentioned," or "aforesaid," or "before specified," or the like, when two or more dates have been

named, is fatally uncertain, unless the words "first aforesaid," or "last aforesaid," or the like, are also used. When time is once stated with certainty, and not otherwise, it is sufficient afterwards to refer to it by the words "then and there," "aforesaid," or similar words; but when several days are before specified, it then becomes necessary to employ the words "first aforesaid," "last aforesaid," or their equivalent, that it may be known with certainty which of the before-mentioned days is intended to be designated. In the absence of such words, in such a case, the indictment will be bad for uncertainty. (Stewart *a.* Com., 4 *Serg. & Rawle*, 194; State *a.* Cotton, 4 *Foster* (*N. H.*), 143; State *a.* Daily, 21 *Mo.*, 495; State *a.* Williams, 4 *Ind.*, 234; Sears *a.* State, 3 *M. & R.*, 45; 2 *Hale*, 178; 2 *Hawk.*, ch. 25, 878, and ch. 23, 888.) Time and place are essential ingredients to a criminal charge, and defects in these respects are not cured by verdict. (Fellner *a.* The People, MS. case; Dedieu *a.* People, 22 *N. Y.*, 178.)

III. The verdict against the prisoner must be set aside, for the reason that the jury who convicted him were not sworn as the law requires—were not sworn at all.

A. Oakey Hall, for the people.—I. Evidence of the bad character of Mathews was inadmissible. 1. Such kind of evidence has been admitted when the *res gestæ* were involved in mystery. Upon this evidence was erected a presumption that a quarrelsome and bad man was likely to be the aggressor. The evidence has been admitted from the necessity of the case, no witnesses being able to give a narrative of the occurrence. See cases cited in Pfomer *a.* People (4 *Park. Cr.*, 558, 567). 2. Such kind of evidence has been sometimes admitted when its knowledge was brought home to prisoner, and he acted on that knowledge. 3. But the weight of authority is against the admission of this class of testimony. (1 *Whart. Cr. L.*, 5 ed., § 641.)

II. The recorder correctly charged the jury, and the conviction should be affirmed.

Sutherland, P. J.—The only material question in this case is as to the admissibility of the evidence offered by the prisoner to show that the character of Mathews, the deceased, in the

community, was that he was a dangerous, violent, and quarrelsome man. The recorder excluded this evidence. In my opinion the evidence was properly excluded.

I cannot find any evidence in the case tending to show that the prisoner and Mathews were acquaintances, or that they had ever seen each other before the affray. There was no proof of any previous relation between them, from which it might be presumed that the prisoner knew Mathews' character good or bad. If Mathews' character was so notoriously that of a dangerous, violent, and quarrelsome man, that the prisoner had heard of it, I find nothing in the case authorizing the inference that the prisoner supposed, or thought, when he stabbed the deceased, that he was Patrick Mathews. At about the commencement of the affray some one called out "Pat:" there was no evidence that it was the prisoner; the inference from the evidence is, that it was one of the Mathews party.

Under these circumstances, how would proof of Mathews' notorious character for violence, &c., have tended to show that the prisoner believed himself in danger, when he saw Mathews approaching him? How Mathews' character could have influenced or had any thing to do with the motives of the prisoner's action, I cannot see.

In my opinion, under the circumstances of this case, the evidence was properly excluded.

Perhaps such evidence might be admissible, when from the previous relationship of the parties, or from other circumstances of the case, it would be reasonable to presume that the prisoner might have acted from a knowledge of the character of the deceased for violence, &c. (See *Wharton's Hom.*, 229; *do. Crim. L.*, vol. 1, § 641; State *a.* Field, 14 *Maine*, 428; State *a.* Tilly, 3 *Ind.*, 424.)

The proceedings in the Court of General Sessions should be affirmed, and that court should proceed and sentence the prisoner on his conviction.

Clerke and Barnard, JJ., concurred.

CORBETT *a.* CLAFLIN.

New York Common Pleas; Special Term, April, 1864.

MOTION TO DISMISS FOR NEGLECT TO PROSECUTE.

The fact that defendant has had the cause reserved generally, does not make it his duty to keep it upon the calendar. If the plaintiff suffers it to go off the calendar, the defendant may move to dismiss the action for neglect to prosecute.

In such case, where the motion is denied on plaintiff's showing sufficient ground for so doing, the terms imposed on him should be, payment of defendant's costs from the time at which plaintiff suffered the cause to go off the calendar.

Motion, on the part of the defendants, to dismiss the complaint for unreasonable neglect to proceed with the cause.

This action was brought by Robert H. Corbett against Horace B. Claflin and others. The defendants' affidavit on this motion stated that issue had been joined on the 30th July, 1859, and a note of issue filed on the 19th September, 1859; that the cause had been frequently noticed for trial, but had never been moved by the plaintiff, and that the cause had been reached in its turn, and junior issues tried; that, at the commencement of the year (1864) the plaintiff had allowed the cause to go off the calendar, and, on the 5th of January, the defendants had served a notice of motion similar to the present, for a dismissal of the complaint, but that the motion had been withdrawn on the plaintiff's attorneys signing a written stipulation to move the cause on in the February term. The affidavit proceeded to state that the plaintiff not only had not moved the cause on in February, but had taken no steps to put the cause on the calendar either for that term or for the March term, whereupon the present motion was made, under Rule 27 and subd. 4 of section 274 of the Code of Procedure.

Christopher Fine, for the plaintiff, opposed the motion.—The plaintiff's affidavit stated that in February, 1861, the defendants' attorney procured the cause to be "reserved generally," and

was not entitled to complain of the plaintiff's neglect to move it on. The cause had lain dormant at the defendants' own instance, and it was in their power to have moved it on at any time on two days' notice. That, as to the cause not having been retained on the calendar at the commencement of the year, it was an oversight, arising out of a new rule of the court. The clerk of the plaintiff's attorney had been directed to file the proper note of issue, but had omitted to do so. The laches were as much those of the defendants as of the plaintiff, because the defendants had had the cause reserved to suit their own convenience, and, if they wished to force the cause to trial, ought to have moved the cause on the calendar. Under the authority of the case of Moeller *a.* Bailey (14 *How. Pr.*, 359), he submitted that where laches were clearly shown on the part of the defendants, the court would not dismiss the complaint, especially where, as in the present case, the plaintiff was ready to undertake to try the cause at the next term.

I. T. Williams, for defendants.—Admitting that the cause had been reserved on the former calendar at the instance, and for the convenience, of the defendants' attorney, as had been alleged, still it was the duty of the plaintiff to keep the cause on the calendar. It was no part of the defendants' duty to do that. So long as the cause stood reserved on the calendar, it was in the defendants' power to move it upon the day calendar at two days' notice. If the plaintiff allowed it to drop, they could not do this. It had been argued that this was as much the duty of the defendants as of the plaintiff, and the case of Moeller *a.* Bailey (14 *How. Pr.*, 359) had been cited, but that case had been entirely overruled by the case of Bowles *a.* Van Horne (11 *Abbotts' Pr.*, 84; S. C., 19 *How. Pr.*, 346); or rather, Justice Hoffman had clearly shown, in the latter case, that the grounds upon which Judge Harris had decided the case of Moeller *a.* Bailey, namely, the abeyance of the 27th Rule, had no application after the restoration of that rule in August, 1858. The rule was now as it stood at the date of the case of Bowles *a.* Van Horne,—not as it stood when Moeller *a.* Bailey had been decided. But if there had been any excuse for the plaintiff previously to the date of the stipulation of January 18th, 1864, there could be none after. Why was not the

cause put on the calendar for February, as stipulated? why not for March? Were the defendants bound to pay the stenographer's fee, in order to place the cause where it had been the duty of the plaintiff to keep it?

Daly, J.—A case of negligence is clearly made out. The allegation that the defendants had had the cause reserved on the former calendar ceased to have any force when the plaintiff allowed the cause to go off the calendar altogether. It was not the duty of the defendants, but of the plaintiff, to keep it there. The defendants were not bound to carry on the plaintiff's suit. There was negligence in not having the cause retained on the calendar at the commencement of the year. There was still greater negligence in omitting to place the cause on the calendar for February and March, after express stipulation. The authority of Bowles *a.* Van Horne, cited by defendants' counsel, is satisfactory and conclusive authority. But, here, as in that case, I think sufficient has been shown to warrant the court in allowing the plaintiff an opportunity of trying the cause at the next term, upon terms. What those terms should be, is the question.

Defendant's counsel stated that, in the case of Bowles *a.* Van Horne, Judge Hoffman had held that the cause could only be retained on the terms that the plaintiff paid all costs incurred up to that date.

Contra, it was argued that the circumstances were different. Here no neglect could be charged up to the end of the year 1863, while the cause stood reserved by consent of parties.

Daly, J.—I think the negligence commenced on January 1, 1864, and that the penalty ought only to attach during the period over which the negligence extended, namely, the months of January, February, and March. The motion will be granted, unless the plaintiff, within ten days, place the cause on the calendar, and stipulate to try at the next term, and pay to the defendants costs for the January, February, and March terms, with disbursements, and ten dollars costs of this motion.

Order entered accordingly.

BENKARD *a.* BABCOCK.

New York Superior Court; General Term, February, 1864.

WAIVER OF APPEAL.—ACCEPTING PAYMENT OF JUDGMENT.—COUNTER-CLAIM.—LEASE WITH WARRANTY AGAINST PERCOLATION OF WATER.—OPINIONS OF WITNESSES.—MEASURE OF DAMAGES.

The receipt of the amount of a judgment, voluntarily paid, does not affect the right of the party receiving the payment to appeal from the judgment simply to obtain a judgment for more. The principle upon which a party enforcing a judgment is not allowed also to appeal from it, rests upon the injustice of enforcing or claiming that, the only right to which is derived from the judgment of a court, and repudiating that which is made the consideration therefor by by the same adjudication, considered as an entirety.

Where the defendant sets up a claim against the plaintiff as a set-off, with a prayer for judgment for the excess of his demand over the amount claimed by the plaintiffs, his rights as to such demand, as well as the pleadings and evidence in relation thereto, are to be governed by the same rules as if he were a plaintiff suing upon such claim.

Under a covenant in a lease that the sub-cellar of the premises should be "free from percolation of water through the walls," an answer in an action against the tenants for rent, that during a period exceeding several quarters, the water had percolated through the walls, and rendered the premises unfit for use, is not a claim for damages during each quarter respectively, to be set off against the rent due at the end of that quarter, but a claim for general damages as being caused by one continuous occurrence.

In such a case it is proper to charge a jury that the defendants cannot claim for "any injury resulting from dampness not caused by percolation of water into the sub-cellar." Any necessary natural dampness incident to the location of the sub-cellar or its construction, and not effected at all by water getting through the walls or floor of the sub-cellar, is a consequence which the defendants themselves must bear.

In such an action it is error to allow inquiries to be put to witnesses as to the injury to the value of the premises in consequence of the dampness thereof, without laying a proper foundation for such inquiries by showing a breach of the covenant during the time referred to.

Testimony as to the injurious effect of moisture in such a case is not proper, without reference to the origin of the moisture; and the admission of such testimony is erroneous.

A witness who is shown to have hired stores, and is acquainted with their value, is not thereby shown to be an expert, and qualified to express an opinion as to the deteriorating effect of dampness in the cellar of the store, on its yearly value.

Such difference in yearly value is not a proper subject of proof by the opinions of witnesses.

Nor is it the proper measure of damages, where the lessees' interest in the term is not assignable.

Appeal from a judgment

This action was brought by James Benkard and Benjamin H. Hutton against Charles H. Babcock and others, to recover the rent which the latter had covenanted to pay in a lease of a store or warehouse in the city of New York.

By the lease the plaintiffs had covenanted that the sub-cellar of the premises should be free from percolation of water through the walls, &c. The defendants set up in their answer that this covenant had been broken, and claimed damages therefor in effect as a counter-claim.

The plaintiffs having recovered a verdict for a part of the amount they claimed, entered judgment, with costs, which the defendants voluntarily paid, and which was accepted by the plaintiffs, who nevertheless prosecuted this appeal from the judgment to gain a new trial for alleged errors at the first trial. The details of the facts sufficiently appear in the opinion of the court.

Wm. Curtis Noyes, for appellants.

Augustus F. Smith, for respondents.

By the Court.*—Robertson, Ch. J.—It is claimed by the defendants that the plaintiffs have waived their appeal in this case by accepting from them the amount of the verdict in favor of the latter, with costs. Numerous authorities have been cited to us on the argument to sustain that position, but they will all be found to be cases where an appellant had attempted actively to enforce either the whole of a judgment-order or decree in his favor, or else some part thereof, connected with and dependent upon such other part thereof as he may have appealed from; or else where he had availed himself of some benefit or favor granted or offered to him by such judgment-order or decree, as an alternative to exercising the right of appeal. Thus

* Present, Robertson, C. J., Garvin and McCunn, JJ.

in one of the most recent cases, Bennett *a.* Van Syckel (18 *N. Y.*, 481), a defendant had appealed from all parts of a judgment, except such as ordered the plaintiff to execute a bond of indemnity to him against the covenants in a lease, which he was therein directed to assign to the plaintiff, and also to pay certain moneys into court to have the right thereto contested; notwithstanding which, he sued upon such bond of indemnity when delivered to him, and proceeded to litigate his right to such moneys; and it was held that the connection of all parts of such judgment with, and their mutual dependence upon each other, precluded the defendant from availing himself of such part of the judgment as was in his favor, and appealing from that which was prejudicial to him.

In Vail *a.* Remsen (7 *Paige*, 206), the more general principle was sanctioned, that proceeding upon an order appealed from by an appellant was a waiver of his appeal.

In Radway *a.* Graham (4 *Abbotts' Pr.*, 468), and Lewis *a.* Irving Ins. Co. (15 *Ib.*, 140), the acceptance of a benefit granted by an order in the shape of costs to an appellant, as a condition of a favor granted thereby to his adversary, was held to be a waiver of an appeal from the part of the order granting such last favor.

In Noble *a.* Prescott (4 *E. D. Smith*, 139), the mere renewal of a motion, according to a privilege to do so granted in an order denying such motion, was held to be a waiver of an appeal from the part of the order so denying it.

The decisions in all these cases are traceable to the same principle as that laid down in Bennett *a.* Van Syckel (*ubi sup.*), which is the injustice of enforcing or claiming that, the only right to which is derived from the judgment of the court, and repudiating that which is made the consideration therefor by the same adjudication, considered as an entirety.

The principle applied in those cases, therefore, does not conflict with that sustained in Higbie *a.* Westlake (14 *N. Y.*, 281), and Clowes *a.* Dickenson (8 *Cow.*, 328), which were decided in the court of last resort. That justified an appellant in receiving money voluntarily paid to him, although adjudged to be due to him by a judgment-order or decree from which he had appealed, simply to gain a decree for more. Whatever might be the result of the appeal, he could not be compelled

to restore moneys so voluntarily paid. It was only available as an extinguishment of his claim, or part of it, in any subsequent litigation, and formed no basis for an order of restitution. A tender and payment of money into court admits the cause of action, and gives to the party to whom it is tendered an absolute right to such sum for the same reason. The payment of a sum of money on account of a claim, even after judgment, does the same thing. The existence of the judgment is immaterial, and the pendency of the appeal only has the effect of rendering it contingent and precarious. The tender of the amount stops interest on the whole claim, if the appellant never recovers any more. A party who refuses a tender loses both interest and costs if he afterwards seeks to enforce his claim by action, simply because the law discourages unnecessary litigation. After an action is begun, an appeal to correct judicial errors is a right, only regulated, but neither favored nor disfavored by the law. A right of tender, therefore, intended merely to prevent interest and costs, should not be abused in order to compel the opposite party either to abandon his appeal, or waive all claim to interest. Both parties deal together, subject to the result of the appeal, as to the question of amount, on which the running of interest as well as future costs must depend, whatever may be the decision on such appeal.

The plaintiffs are also obliged to enter up a judgment in order to bring an appeal. That judgment becomes a debt of record, having the like incidents as other debts, including its bearing interest. It does not merge the original claim, unless the litigation ceases there by the appeal being unsuccessful. A tender and refusal is as effectual as a payment and receipt of moneys to stop interest. There is no principle by which a party is to be absolutely barred from litigating his claim for a larger sum than that paid, merely because he accepts part in order to prevent a loss of interest if he turns out to be wrong. A tender accompanied with a demand of the acceptance of the sum in full discharge of all claims, or any other condition, is bad (Wood *a.* Hitchcock, 20 *Wend.*, 47), and therefore he, to whom it is made, cannot be compelled to accept it. The actual acceptance of the sum, therefore, only extinguishes a claim where it is all to which the claimant is entitled. What the plaintiffs are entitled to in this case depends on the result of their appeal. I do not know

that if the tender had been refused the defendants would have been bound to make it good by forthwith bringing it into court; or if they did so, I apprehend the court would not make a waiver of the appeal a condition of taking it out, whatever other conditions they might impose.

The motion to dismiss the appeal should, for the reason before given, be denied with costs.

In order to determine the merits of the case before us, it will not be necessary to notice those covenants in the lease in question, for whose breach no damages were proved or claimed, or the parts of the pleadings which relate thereto, except so far as the admission of evidence, or the effect of such covenants, if any, on that covenant for the breach of which damages were recovered, or their influence on the question of those damages may require it. Such lease contained no covenant for general repairs on the premises by either lessors or lessees. The defendants covenanted to do only such repairs as might be rendered necessary by their use and occupation of the premises, besides agreeing to surrender the premises in as good state as reasonable use and wear would permit, damages by the elements excepted. Permission was, however, reserved therein to the plaintiff, their servant, or agent, at all times, during the term, to enter into and inspect the demised premises, and "make such repairs therein as they shall deem proper." The premises were described in such lease as a "five-story marble-front store," and were thereby demised "for the purpose of the drygoods business." The defendants covenanted not to use or occupy them, or to permit them to be occupied, or underlet them for any other business, and not to assign such lease, or the term granted thereby, without the consent of the plaintiffs. The covenant, for whose breach damages were deducted from the claim of the plaintiffs, was not an undertaking by them to do, or forbear to do any thing, but simply a guaranty against the occurrence of a particular event not under their control, to wit, the percolation of water through the walls or floor of the sub-cellar of such building.

What difference it might have made in the practical result of the action, or the admissibility of evidence, or rule of damages, if the defendants had sought to recoup for injury sustained by them by ingress of water into the building in question,

instead of setting off their damages, it is not necessary to discuss. Damages for a breach of a continuing covenant of guaranty against a particular occurrence affecting lands (Mayor, &c., of New York *a.* Mabie, 13 *N. Y.* (3 *Kern.*), 151), or even of a covenant to do a particular act, such as repairing (Nichols *a.* Dusenbury, 2 *N. Y.* (2 *Comst.*), 283), may be recouped. But in the latter case, the defendant is limited to the expense of doing such act, and cannot recover special damages (Dorwin *a.* Potter, 5 *Den.*, 306), which are not the subject of recoupment (Allaire Iron Works *a.* Guion, 10 *Barb.*, 55). How far injuries, arising from the ingress of water into a building, although continuing for more than three months, could be subdivided so as to have the damages arising therefrom during each quarter deducted from the rent therefor, by way of recoupment, is at least doubtful; claims arising out of one contract cannot be applied in reduction of those growing out of another distinct one, although contained in the same instrument or forming part of one transaction. (Seymour *a.* Davis, 2 *Sandf.*, 239; Deming *a.* Kemp, 4 *Ib.*, 147.) Whether a covenant to pay rents in quarterly payments does not or does make the payments of each year's or quarter's rent a separate contract, so as to enable the lessee to deduct damages for injuries during each quarter or year, arising from a breach of a continuing covenant, is perhaps immaterial in this case. The claim by the defendants for injuries arising from the entrance of water into the sub-cellar in question is made in the answer by way of set-off, and a prayer is also contained therein for judgment for the excess of their damages beyond rent claimed by the plaintiffs. The claim of the plaintiffs is substantially admitted, and the rights of the defendants to damages for breach of such covenant, as well as the pleadings and evidence in relation thereto, are to be governed by the same rules as if they were plaintiffs in an action on such covenant, and I shall proceed to consider their rights in the same manner as if they stood in that position.

The language of the covenant on which damages were recovered by the defendants is somewhat peculiar. It is not that water should not percolate through the walls and floor of the sub-cellar in that question, but such sub-cellar should be "free from (such) percolation of water." It seems, therefore, not to have intended that as many causes of action should arise as acts

of percolation should occur, but rather one only, for the subjection of the premises to such ingress of water during the time. The answer also adopts this view by negating the freedom of such sub-cellar from such invasion, and averring that, "during all or the greater part" of the time until then, water had percolated through its walls and floor, and rendered the same wet and damp and unfit for use. It also alleges, as an injury from "such wetness, dampness, and presence of water in such cellar," deprivation of its use for the purposes for which it was let to the defendants, and also for the storing of drygoods therein; and avers the difference in value of such premises fit as covenanted in such lease for the business for which they were let, and their value, in consequence of the condition of such cellar, to be a certain sum per annum, which the defendants claim up to a certain date and onward to the time of trial, and damages. This certainly is not a claim for damages for each single act of percolation, during each quarter, and its consequences, to be set off against the rent due at the end of that quarter, but is a claim for general damages for injury to the defendants during all the time previous to the trial, caused by one continuous occurrence consisting of successive acts violative of such covenant. (Shaffer *a.* Lee, 8 *Barb.*, 412.)

No requests to charge were made, or exceptions taken to the charge as made, except as to the effect of certain letters. How the jury arrived at the amount of damages allowed the defendants, does not legally appear on the record. The amount would seem by calculation to correspond with the amount claimed in the answer of annual damages, by reason of the occurrences complained of, if allowed during the time water came into the cellar, from June, 1861, the date of its first appearance there, to its final exclusion by appliances introduced by the plaintiffs. But another claim for damages from a similar cause, during a prior period, was submitted to them by the learned judge before whom the cause was tried, to wit, from the time of the defendants' entering into possession until the November following, but without any evidence in the case, that I have been able to find, to sustain such a claim. There was evidence to prove that such sub-cellar had been damp during the period last mentioned, and that such dampness might have arisen from moisture in the materials of which it had been recently built; there was none to prove it arose from any perco-

lation of water in the cellar. The learned judge properly instructed the jury that the defendants could not claim for "any injury resulting from dampness not caused by percolation of water into the sub-cellar; any necessary natural dampness incident to the location of the sub-cellar, or its construction, and not effected at all by water getting through the walls or floor of the sub-cellar, is a consequence which the defendants themselves must bear."

The testimony of one of the defendants (Babcock) was, that he first observed water in the cellar in 1860, without stating where it was, or how it got there, without fixing the date, except prior to August, 1860: He also stated the cellar generally to be damp at some indefinite time, yet admitted it to be fit for storage for the period between December, 1860, and June, 1861, although not at other times, by "reason of the dampness, liability of the water to percolate through the floor," as to which he furnished no evidence of *indicia.*

Another defendant (Milner) testified to having noticed, without fixing the date, a general dampness throughout the whole store, as well as to the unfitness of the store for the storage of drygoods from May, 1860, to December, 1862. A porter of the defendants (Fitzpatrick) testified that he thought he noticed water around the elevator in June, 1860; that the state of the cellar from May to December, 1860, was "damp a little, part of the floor was damp and part dry." He also expressed an opinion as to the fitness of the cellar for storing drygoods from May, 1860, to December, 1862. Another porter (Armstrong) thought "the cellar very damp and wet;" this was some time before the early part of 1861. The father-in-law of one of the defendants (Franklin), who occupied part of the basement, testified, "there was dampness round the columns in August, 1860, and the autumn of that year, and since that time the basement had been so damp he could not stay over an hour there." Also, that after June, 1860, "there was more or less dampness in the sub-cellar all the time." On the other hand, the defendant Milner admitted on his examination that they "deemed the cellar safe for the storage of drygoods from the autumn of 1860 to the spring of 1861;" that he thought it very likely that a statement was made to one of the plaintiffs that the place was dry, and there was no water; because at the time they stored

goods there, they considered the basement or sub-cellar reasonably dry:" He also stated that the basement would be "naturally a little damper" than the sub-cellar, and that moisture from the atmosphere would not injure woollen or domestic cotton goods. The agent of the builders of the cellar (Vaughan) constantly examined the cellar, and asked about it of one of the defendants between August, 1860, and April, 1861; but he neither saw nor heard any thing of its dampness: He, among others, testified as to the natural dampness of a cellar, and that it would take six months to dry it. None of the witnesses preserve the distinction very accurately between the dampness of the air of the basement and the cellar, and the moisture of the floor, walls or other solid substances. Stoves and steam apparatus seem to have been employed from time to time to correct the former, and perhaps the latter. The principal if not only subject of complaint from May to December, 1860, was dampness of the atmosphere in the basement and cellar, without the slightest evidence showing that it originated in the oozing of water through the floor or walls. And I am not prepared to consider it as a matter of judicial cognizance that dampness in a room must arise from the percolation of water through its walls or floor, particularly as all the direct evidence in the case shows that it was the inevitable attendant of a newly built cellar. The question of due proof of injury arising from the evil covenanted against, during the period between May and December, 1860, of course is immaterial in reference to its having been submitted as a question of fact to the jury, because there are no exceptions to the charge; but it is important in reference to questions which were excepted to, put to witnesses as to their opinions in regard to deterioration of value in the premises arising from that cause during all that time from May to December, 1862. Thus the defendant Babcock was allowed to state the condition of the sub-cellar in respect to the storage of drygoods during all that time. Another defendant (Milner) was allowed to state what in his judgment the premises in question were worth less per annum during that time "in consequence of the state of that cellar," such state being, as he observed it, merely "general dampness through the whole store, and great dampness in the basement." This certainly was not necessarily injury arising from the entrance of water. Both

those questions were clearly improper, until a proper foundation had been laid by showing that the covenant in question had been violated during all that time.

Another set of questions of a similar character was put to other witnesses in reference to their opinion of the effect upon the yearly value of such store of a certain degree of dampness in the sub-cellar and basement, producing mould upon books, papers, and articles of furniture therein, as well as injury to drygoods. As a necessary foundation for such questions, it should have been preliminarily shown when such dampness existed, as well as that it was caused by the percolation of water through the floor or walls of the sub-cellar; because even if such water entered first through the basement, that formed no cause of action under the covenant in question. Setting aside the evidence, already alluded to, of dampness in the basement and cellar prior to December, 1860, there was no evidence of any ingress of water through the floors of the sub-cellar until about the time of the notice thereof given for the first time by the defendants to the plaintiffs in June, 1861. Mr. Franklin, the occupant of the basement, testified that "after June, 1860, there was more or less dampness in the sub-cellar all the time. . . . . The basement had been very damp, always damp, so much so that I could not stay there any time since August, 1860. I observed a green mould upon my desk, chair, cushion, and books; some of my papers were entirely damp, so that they were almost illegible." He also testified that his papers, in tin boxes placed in a wooden box within an iron safe, "have been saturated, and are still:" He saw the green mould in the autumn of 1860, say in September; he could not state the day. One of the porters (Armstrong) stated that, in his opinion, the cellar never was fit for drygoods, because after opening cases to take out samples, and leaving them open, in two days they would see a "kind of fur" covering the papers, being the mould before spoken of by him. He also testified, without specifying any time, that "Mr. Franklin's desk and books were in such a a state . . . . because it was so damp we could not brush it off. There was a kind of mould at different times upon the chairs, and that pasteboard covers of goods were wet through." One of the defendants (Babcock) stated in his testimony, "There are in the basement, books, a desk, chairs, and other things,

which are mildewed, covered with green mould," without stating when or from what cause it came there. Another (Milner) says, "He had seen mould on Franklin's desk," and had seen goods damp, but with the same indefiniteness as to time. A Mr. Tuttle, another witness, saw the mould on the desk on some occasion when he was there during six or eight visits to the sub-cellar; but without giving their dates, except they were during 1861 and 1862, and prior to December, 1862; and he observed water in the cellar every time. Assuming that such mould and dampening of the covers of goods were seen by the witnesses after June, 1861, when the water percolated through the floor, there was no evidence offered to show that it must have originated from moisture produced by the evaporation from such water, and not from that incident to a cellar damp from other causes. It was in evidence that other causes did produce such moisture, and that it produced the mould and dampened the goods, for even Mr. Franklin saw that in September, 1860, before any water entered, and it was left to conjecture to determine that it arose afterwards from the water which had oozed in. It is true, the coincidence in time of the presence of the water, the damp air, and the mould, might possibly have been thereby established, but neither the court nor the jury would have a right to conjecture therefrom that they were inevitably connected with each other. Several witnesses (Lloyd, Paterson, and Tuttle), however, were allowed to state their opinion of the effect upon the value of the store, basement, and sub-cellar, which merely such moisture in the latter as to cause dampness in the basement, and mould on cases of goods and on Franklin's furniture, books, and papers, and cartoons of goods, would have without regard to or any proof of the origin of such moisture. Such testimony being immaterial by itself, could only have an effect to produce an undue bias on the minds of the jury. The exceptions thereto were, therefore, improperly overruled. Still more objectionable questions were put to two other witnesses (Townsend and Tuttle), who had only made a few visits to the premises, whose varying condition they observed and described, and were asked to state how much less, in their opinion, for the drygoods business, such store, basement, and sub-cellar were worth yearly, in consequence of such condition. That assumed, without evidence, that such condition

continued at least for a year. Tuttle especially was asked about the effect of dampness in the basement, although he had never noticed it, and only saw mould as its effect; while the water found by Townsend was more or less, "sometimes but little, or other times an inch or an inch and a half in depth:" So that the former was made to testify as to the effect of a cause of which he knew nothing, and the latter to the permanent effects of fluctuating causes. Those questions should have been excluded when objected to.

Two witnesses (Milner and Tuttle) were allowed to testify as experts, after objection, as to the effect of the state of the cellar upon the value of the premises in question, when their only stock and extent of experience consisted of having hired stores and being acquainted with their value. They do not appear to have been acquainted with the effect on a yearly rent of dampness in a basement or water in a sub-cellar. A mere knowledge of the value of stores which never had a damp basement, would not assist any one in determining the extent of its deteriorating effects on such value. A singular question was also allowed to be put to a medical practitioner, whether a certain state of dampness in a cellar, producing certain effects, would not be injurious to the health of an occupant of the store to which such cellar belonged. There was no evidence in the case that the health of any of the defendants had been injured by the violation of the covenant complained of, or that they had lost the services of any clerk thereby, or an opportunity of renting the store, or that the danger to an occupant's health was one of the influences which would cause a depreciation in the value of a store in consequence of having a wet cellar. Possibly the court may have allowed the question, first, as matter of discretion, on the supposition that such facts would be proved, and their attention was not called to it, so as to warn the jury against being influenced by it: Still, it was a dangerous exercise of that discretion, as it had a natural tendency to influence their minds, and, being matter of opinion only, should have had the facts which justified its admission first proved. It was, at all events, faulty in assuming the dampness to have been proved to have originated, not in the sweating of a new cellar or other causes, but in the percolation of water.

Another objection, to which every question put to the wit-

nesses on the trial in relation to the difference of yearly value of the premises by reason of the dampness, is exposed, is, that they either assume without proof that such dampness affected such yearly value in the market, or do not discriminate between such reduction and yearly damages, caused by the dampness, to be set off against the rent: in other words, they do not distinguish between such yearly diminution as an element or item of damage and as a standard of damages, throwing out of view all evidence of positive physical injury either to goods or otherwise; or they take it as another element of damage to be added to that last referred to. No preparation was made for receiving it legally as a measure of damages, by ascertaining preliminarily whether dampness usually diminished the value of a store by fixed rates, and that the witnesses knew it: it was clearly not a separate element of damages, unless, besides the probable injury to goods and loss of business embraced in it, the defendants were to be compensated for actual injury. The answers of the witnesses show how they understood such questions; they evidently speculated on the probable amount of injury to the business and the goods, and fastened the loss on the rent, without undertaking to say that such considerations would or did influence persons about to hire stores for the drygoods business.

As a general rule, opinions of witnesses as to damages sustained by one person from the conduct of another, or occurrences for which he is responsible, are inadmissible (Fish *a.* Dodge, 4 *Den.*, 311; Morehouse *a.* Matthews, 2 *N. Y.* (2 *Comst.*), 514; Duff *a.* Lyon, 1 *E. D. Smith*, 536; Dunham *a.* Simmonds, 3 *Hill*, 609), although stated with the facts on which they are founded (Cook *a.* Brockway, 21 *Barb.*, 331; Lincoln *a.* Saratoga & Schenectady R. R. Co., 23 *Wend.*, 425; Harver *a.* Edmonds, 4 *Barb.*, 256), even when such facts are proved, by other witnesses, to have attended the occurrence complained of. (Paige *a.* Hazard, 5 *Hill*, 603.) Opinions of the value of articles may be given by those familiar with the identical article, or similar ones. (Clark *a.* Baird, 9 *N. Y.*, 183.) But wherever the value of the subject to be estimated is uncertain and varying, the witness can only give the elements of value as facts, and leave the jury to make their own estimates. (Dunlap *a.* Snyder, 17 *Barb.*, 561; Maxwell *a.* Palmerston, 21 *Wend.*, 407.) Probable damage to the business or merchandise of a

merchant, by the effects of vapor from a cellar during any fixed time, could not well be measured by any proportion of the rent. It is not probable that any one would hire a store at a rent whose low amount would compensate him for damages to his goods or injury to his business. The only way in which such defect would probably operate on landlords and tenants, would be, by the store commanding tenants such as would not require the use of the parts affected by dampness, or whose business did not suffer from it, and who could not afford to pay the higher rent of a sound store. At all events, no evidence in this case discloses in what way such probable damage affects such yearly value. No question was put to a single witness as to whether the dampness of a cellar affected the yearly value of a store measurably to any extent capable of being stated in money value. Dampness clearly did not affect the rent directly, nor through the medium of actual injury to business or goods; and if it did so in any other way, it must be shown to have done it in that way. The witnesses showed the consequences of putting the question in the mode adopted of assuming that dampness did affect yearly value, and simply calling upon them to state the amount; and the basis of an estimate may be seen in the testimony of one witness (Townsend). He took as the basis of his estimate of the depreciation of rent the loss of a place for samples, the annoyance of procuring another, and injury to goods; which presupposes the occupation of the store, and actual injury, irrespective of diminution in the market value. As those injuries would depend on fluctuating causes, the jury were the sole proper judges of their extent, when the facts were given.

There was also another serious objection, in giving evidence of a deterioration in the market value of the stores by the dampness of the cellar—which was, that the defendants could not assign their interest in the premises without the consent of the plaintiffs, and it was not therefore a vendible commodity; their sole value to the defendants was their right of occupying them. The law might transfer them to another, the parties could not.

The questions put to witnesses, therefore, as to deterioration in value of the premises, or some of them, were inadmissible on some one or more of the grounds already stated, to wit:

1st. The evidence did not establish that the dampness referred to arose from the evil covenanted against.

2d. It did not establish that the witnesses whose opinion was sought were experts in the effect of dampness in cellars upon the rents of stores.

3d. If the questions put were intended to elicit the opinions of witnesses as to the value of the probable extent of injury to the goods and business of the defendants, it was substituting the witnesses in place of the jurors, who alone are judges of the facts.

4th. If such questions were intended to elicit the opinion of witnesses as to a loss in the market value of the store, they were premature, until it was shown that dampness in cellars depreciated such value; and even if it had been shown, the defendants could not lose what, by the terms of the lease, they had no right to gain.

For which reasons, as the exceptions to such questions were well taken, it renders any consideration of other topics almost unnecessary. The defendants, for their own sake, would have been obliged to do something to prevent the effects of the water: they could not legally have allowed it either to remain or re-enter, so as to produce all the harm it could, in order to recover all the damages they could therefor from the plaintiffs. The contract is one of indemnity merely,—in fact closely resembling that of insurance, particularly as it is against one of the elements: the plaintiffs are, therefore, entitled to compensation for actual loss alone for the expense of repairing past and preventing future evils, besides deprivation of temporary use of the building, or permanent deterioration of it. The acts done by the plaintiffs may not have been strictly repairs; their entry, however, was under the defendants' license, until May, 1862. No physical obstruction was ever placed in the way of their proceedings, and they completed the work of excluding the water from the cellar. The notices given in July and May of that year, of course did not disentitle the defendants to compensation for damages which were the natural and necessary result of the percolation of water, and either not caused by their own delay in preventing repairs, or caused by the improper delay of the plaintiffs, who undertook to make them; but they had no other effect. What might have been the

rights of the parties, if the plaintiffs had retired pursuant to such notices, it is not necessary to decide.

The judgment therefore should be reversed, and a new trial granted, with costs to abide the event.

TRIGG *a.* HITZ.

Supreme Court, First District; General Term, March, 1864.

INTERPLEADER.—VENDOR AND VENDEE.—ESTOPPEL.—SALE PROCURED BY FRAUD.—PURCHASER IN GOOD FAITH

An action of interpleader cannot be maintained by the buyer of goods to settle the conflicting demands of his vendor, and a stranger, who claims the purchase-money on the ground that the vendor had obtained the property from him by fraud.

Interpleader is allowed only to those who are in danger of loss by an inability to determine to whom the money or property in question belongs.

To sustain an action of interpleader, it must appear that the plaintiff is ignorant of the rights of the respective claimants; nor can he assert such ignorance where his liability to one of the parties rests upon an estoppel.

Thus, where a *bona-fide* purchaser of merchandise brought an action of interpleader against his vendor, and a previous owner, who claimed to have been defrauded of the goods by the vendor, and also against the indorsee of a check given for part of the purchase-money, and the assignee of the remainder,—*Held*, that the action could not be maintained.

A person who has voluntarily parted with his goods to a fraudulent vendee, under circumstances which would vitiate the sale as against the latter, must, on reclaiming his property, protect from loss a purchaser in good faith from the fraudulent vendee.

In such case, it is the duty of the purchaser to give to the original owner of the goods all the information in his possession, to enable the owner to obtain his rights; if the latter omit or neglect to take the remedies open to him, the further liability of the purchaser ceases.

Appeal from an order continuing an injunction.

This action was brought by George P. Trigg against Edward Hitz, Sereno D. Nickerson, Thomas W. Nickerson, Charles H. Mansfield, and William Rossman. The plaintiff had bought of one Bernard Rice 300 quintals of codfish for $1,285, and

gave in part payment his check for $600. He subsequently ascertained that the defendants Nickerson claimed half the codfish, and defendant Mansfield the residue, alleging that Rice had obtained it from them by fraud, and he thereupon stopped payment of the check, which passed into the hands of Rossman, and of the balance of the purchase-money, which was assigned to Hitz. The Nickersons commenced an action against Rossman, Hitz, Rice, and Mansfield, to reclaim Nickersons' share of the codfish, claiming that Rossman was not a *bona-fide* holder of the check, and that Hitz took the account subject to the equities, &c., and demanding judgment for the delivery of the codfish, and other suitable relief. In that action Mansfield answered, claiming similar suitable relief on his part. Rossman had previously brought suit in the Superior Court against Trigg upon the check. In Nickerson *a.* Rossman, an injunction which had been obtained was dissolved, on Trigg's paying into the United States Trust Co. $600, and the costs in Rossman *a.* Trigg, and on Hitz paying in $45. On appeal by the Nickersons, this order was affirmed by the general term. The present action by Trigg was in the nature of a bill of interpleader. Hitz, in the mean time, obtained judgment on his claim. An injunction was granted, on notice, by Mr. Justice Sutherland, the nature of which sufficiently appears from the following opinion.

Sutherland, J.—I see no necessity, or even occasion, for a bill or action of interpleader as between the defendants as to the fund. Their respective rights in or to the fund can, and it is to be presumed will be, settled in the action of the Nickersons now pending. That action must be considered as an action to reach the fund, the price of the quintals of fish, and not an action to recover the possession of the quintals of fish, although the prayer for relief is in the alternative. I do not see why the relief which George P. Trigg asked for by his motion in that action should not have been granted. Assuming, however, the decision of that motion to have been right, I think, regarding this action by Trigg simply as an action to restrain further proceedings in the actions of Hitz and of Rossman on or under the judgment of Hitz, that I can and ought to continue the injunction restraining any further proceedings on or under the Hitz judgment, or the

execution issued thereon, at least until the hearing and determination of this action, on Trigg depositing in the United States Trust Co., to the credit of the action of the said Nickersons, the amount of such judgment. It seems that Rossman's action has been discontinued. There is, therefore, no occasion for any injunction as to that. It is possible that I ought also to order the action of the Nickersons to be discontinued as to Trigg, upon his thus depositing the amount of Hitz's judgment; but I have doubts whether I can regularly do so on this motion, and I will reserve that question until the settlement of the order, as also the question of costs on this motion.

The order, as settled, did not require the discontinuance of Nickerson *a.* Rossman, but enjoined Hitz from further prosecuting his judgment, on Trigg paying the amount into the United States Trust Co. Hitz appealed.

Philip J. Joachimsen, for the appellant.—I. The facts upon which the order below was made, had been adjudicated in the case of Nickerson *a.* Rossman. No new facts were made to appear, and the court should have held the matter to be *res judicata.*

II. An interpleader cannot be sustained after judgment. The rule is, that "the party seeking relief must have incurred no independent liability to either claimant." (*Adams' Eq.*, 204; *N. S.*, 394.)

III. The form of interpleading in this State is now prescribed by section 122 of the Code. The plaintiff had the opportunity to take that remedy, but allowed the time to elapse. He was guilty of laches. (Bedell *a.* Hoffman, 2 *Paige*, 199; Badeau *a.* Rogers, *Ib.*, 209.)

IV. The principle of the case of Marvin *a.* Elwood (11 *Paige*, 365), is directly in point, and adverse to the plaintiff. So is Lund *a.* Seaman's Bank for Savings (37 *Barb.*, 129).

V. The plaintiff's bill cannot be maintained. He shows that his liability to the different parties are of different natures. "The same thing or duty must be claimed by both." (Shaw *a.* Coster, 8 *Paige*, 339; *Adams' Eq.*, 204, 394, note *w.*)

VI. It appears affirmatively that Mansfield can have no remedy against Trigg.

VII. It also appears that Trigg was indemnified by Mansfield.

Augustus F. Smith, for the respondent.—I. This is a case for an interpleader within the rule stated in Badeau *a.* Rogers (2 *Paige*, 209).

II. That the bill was not filed until after Hitz's judgment, is excused within the case of Cornish *a.* Tanner (1 *Young & Jervis* [*Exch.*], 333).

Leonard, J.—The allegations of the complaint, and the facts mentioned in the affidavits upon which the injunction herein was allowed, present a case wherein an interpleader, by the settled rules and practice in equity, cannot be sustained.

The plaintiff, by his own showing, was a *bona-fide* purchaser of the merchandise, for which he has given his check in part payment, and remains liable, in account for the residue of the price, to the defendant Hitz as assignee of the vendor.

The plaintiff alleges that two firms residing in Boston, who are made defendants herein, were induced to sell the merchandise in question, through the frauds of the party who sold to the plaintiff, as those firms allege, and that they now claim the merchandise, or the proceeds thereof in the hands of the plaintiff.

It is a well-settled principle, that a bailee cannot deny the title of his bailor, nor can a vendee deny title of his vendor. (Marvin *a.* Elwood, 11 *Paige*, 365; Shaw *a.* Coster, 8 *Ib.*, 339; Lund *a.* Seaman's Bank for Savings, 37 *Barb.*, 129.)

The Boston firms have no right of action against the plaintiff, at law, to recover the price of their merchandise. The plaintiff, being a *bona-fide* purchaser, will be protected against the claims of those firms, unless they return him his check; and, in that case, they could maintain replevin for the goods, or an equitable action against the plaintiff and the alleged fraudulent purchasers and their assignee, to reach the unpaid contract price of the merchandise in the hands of the plaintiff, and also to compel a surrender of the check in the hands of any third party who should not be a *bona-fide* holder for value. Such action or actions must be commenced, however, within a reasonable time, or the plaintiff will be justified in paying the money to the parties who made the actual sale and delivery of the merchandise to him.

It is no part of the duty of the plaintiff to embark in a liti-

gation for the purpose of saving from loss the parties alleged to have been defrauded.

Interpleader is not allowed for any such purpose. It is allowed only to those who are in danger of loss by an inability to determine to whom the money or property in question belongs, when there is no superior duty to either claimant.

It is the business of the party who has voluntarily parted with his goods, although they were obtained by a fraud (not amounting to a felony) which would be sufficient to vitiate the transaction as against him, to seek his satisfaction or indemnity in such a manner as not to inflict loss or injury upon an innocent purchaser from his fraudulent vendee. The defrauded party cannot obtain relief upon any other terms as against a purchaser of the merchandise in good faith.

The defrauded firms claim the merchandise, or its proceeds in the hands of the plaintiff, by an independent title. It is the duty of the plaintiff to afford these firms every facility, and all the information in his possession, to enable them to obtain their just rights; but if, after notifying them of every fact in relation to the transaction within his knowledge, those firms shall neglect or omit to take the remedies open to them, until the plaintiff can no longer defer payment without a breach of the duty owing by the vendee to his vendor, or until the vendee is in default to his vendor, then the plaintiff will have performed all the duty which the defrauded firms can claim from him, and his further liability to them will cease.

The law also requires that the plaintiff should be ignorant of the rights of the respective claimants. It is true, the complaint alleges that the plaintiff is ignorant in this respect, but it is entirely clear that he well knows his liability, as a vendee, to the party of whom he purchased the merchandise, and that it is not permitted to him to defend himself against the action of the vendor (or his assignee, Hitz) by denying the title of his vendor, or by asserting a better and independent title in either of the Boston firms.

The plaintiff, by bringing this action, attempts indirectly to deny the title of his vendor. He alleges ignorance of a fact about which the law does not permit him to be ignorant, viz., the rights of the vendor against him, in order to give apparent jurisdiction in this action.

The complaint cannot, in my opinion, be sustained. Each of the defrauded firms must seek his own redress, by separate actions, in such manner as will afford full protection to the plaintiff, or discharge from liability on his part to his vendor, or the assignee of the vendor's demands, whether arising on a check or upon account.

The order appealed from should be reversed, and the injunction be dissolved. Costs to abide the event.

The plaintiff can make his application in respect to the fund paid into court, in the action wherein the deposit has been made.

CLERKE, J., concurred.

SUTHERLAND, J.—I concur, on the ground of the decision of the general term in Nickerson *a.* Rossman.

CHAINE *a.* COFFIN.

Supreme Court, First District; At Chambers, November, 1863.

PARTIES.—ARREST.—FIDUCIARY CAPACITY.—GUARANTY.

Under an agreement that a manufacturer should consign his wares to B. & M. for sale, and that C. & H., who had guaranteed such notes as might be taken by B. & M., should receive, collect, or otherwise in their discretion dispose of the same; such notes, and their proceeds in the hands of C. & H., are received in a fiduciary capacity for account of the manufacturer, and may be followed in the hands of any person not a purchaser for value.

An order of arrest may be granted against the debtors in an action to recover moneys received in a fiduciary capacity, although the action seeks incidental equitable relief against transferees of the trust fund.

After a trial by the court, and a decision directing judgment for money, on the ground that it was received in a fiduciary capacity, the court refused to vacate an order of arrest which had been granted on the same ground.

Motion to vacate order of arrest.

This action was brought by James Chaine, executor, in 1857, to recover certain notes and moneys received by the defendants, Edward Coffin and George G. Haydock, alleged to belong to

plaintiff's testator, who had been a linen manufacturer in Ireland, doing business under the name of Wm. Chaine & Son. Coffin and Haydock became insolvent, after having sold a great portion of the notes which they had received, and they made a general assignment for the benefit of creditors. Brown, their assignee, and other persons, were made defendants in this action, with the view of reclaiming the notes and proceeds which had been transferred by Coffin and Haydock.

In April, 1856, the defendants last named had addressed Wm. Chaine & Son as follows:

"For two and one-half per cent. commission on account of sales to be to us paid, we have agreed upon certain terms with Ball & Moore to guarantee to you the proceeds of all sales made by them for your account in the United States. This guaranty to terminate on the 31st day of December, 1858, unless mutually agreed upon to the contrary. Trusting that the energy and good knowledge of business possessed by Messrs. Ball & Moore will be the means of introducing you to a large and profitable business in this country, we remain, &c."

At the same time the defendants made the following agreement with Ball & Moore:

"Articles of agreement between Edmund Coffin and George G. Haydock, composing the firm of Coffin & Haydock, and Augustus F. Ball and Samuel L. Moore, composing the firm of Ball & Moore. Witness as follows:

First. In consideration and upon condition of faithful performance on the part of the said Ball & Moore of all and every the matters and things hereinafter mentioned to be by them done and performed, the said Coffin & Haydock hereby agree to guaranty to the firm of William Chaine & Son, of Muckamore, Antrim, Ireland, the payment to them of all accounts, notes, and other bills receivable taken by the said Ball & Moore for sales of goods and merchandise consigned to them by said William Chaine & Son, and sold by said Ball & Moore to the persons and firms named, or to be named, in certain pass-books as hereinafter mentioned and provided.

Second. In consideration of the agreement of Coffin & Haydock as above, the said William Chaine & Son hereby agree to pay to said Coffin & Haydock two and one-half per cent. on

the amount of all sales made by Ball & Moore for or on account of said William Chaine & Son; also, that the said Ball & Moore shall and will, on the first day of each month, render and deliver to Coffin & Haydock a full and true statement of all sales of goods and merchandise made by Ball & Moore, for or on account of said William Chaine & Son, during the preceding months, with the names of each person or firm, and the amount sold to each; and at the same time will hand over and transfer to Coffin & Haydock all notes and other bills receivable taken or received, and all book-accounts made within such preceding month for or on account of such sales as aforesaid, to be by them collected, or otherwise in their discretion disposed of.

Third. It is mutually agreed that the notes, book-accounts, and other bills receivable to be guaranteed as aforesaid now are, and at all times hereafter shall be, restricted and limited to those made by the persons and firms named in certain pass-books to be kept and used for such purpose; which books are, and at all times shall be, subject to revision, correction, and alteration by Coffin & Haydock, who may also erase, alter, and add thereto either names of persons or firms, or amounts, and shall give reasonable notice to Ball & Moore of their doings in these respects: provided, however, that the indebtedness as aforesaid of no such person or firm, at any one time, shall exceed the amount which at that time shall stand opposite to his or their name in said books.

Fourth. All payments and remittances to be made by Coffin & Haydock under this agreement, and shall be made in first-class sterling bills of exchange, payable to the order of said William Chaine & Son.

Fifth. This agreement shall remain in full force until the 31st day of December, 1858, unless mutually agreed upon to the contrary.

BALL & MOORE.
COFFIN & HAYDOCK."

NEW YORK, April 1, 1856.

Soon after this, William Chaine & Son consigned goods from time to time to Ball & Moore, which they sold, and deposited the proceeds with defendants, taking their receipts as for account of William Chaine & Son.

Some portion of the proceeds of sales were remitted by de-

fendants to William Chaine & Son. Prior to September 11, 1857, defendants had, however, so received from Ball & Moore a very large amount beyond what they had so remitted.

On the 11th of September, 1857, defendants became insolvent, and the next day Chaine & Son, by Ball & Moore as their agents, demanded a delivery to them of the notes and moneys so received and not remitted; at the same time offering to return the receipts and refund any expenses or advances. This was refused.

The greater part of the notes had been collected by defendants, or procured to be discounted, and they had received the proceeds and applied the same to payment of their own debts.

The defendants, by their answer, claimed the right so to use the proceeds of the notes, under their agreement with Ball & Moore. The action was tried at special term, before Mr. Justice Ingraham; his decision was as follows.

Ingraham, J.—Even conceding the agreement of Ball & Moore with Coffin & Haydock to have been admissible in evidence, still I am of the opinion that there is nothing in that agreement to devest the plaintiff of his title to the notes, or to the proceeds of his property sold by Ball & Moore. Coffin & Haydock were guarantors of all the sales made by Ball & Moore. The provisions of that agreement, as I understand them, were intended to protect Coffin & Haydock against any misapplication of the funds by Ball & Moore, and for that purpose they agreed that the notes should be received and handed over to Coffin & Haydock for collection; and as they guaranteed the payments of the notes, they assumed the right to sell the notes in their discretion. In either event, the collection or disposal of the notes was for the account and benefit of plaintiff, and not of Coffin & Haydock. The receipts of Coffin & Haydock for the notes acknowledge the notes to have been received on account of the plaintiff.

If the notes are collected, it cannot be denied but that such collection must be for the benefit of the plaintiff. It would be idle to say that Mr. Chaine intended by the agreement that such collection should be for the benefit of Coffin & Haydock. The authority to dispose of the notes can only be for the same

purpose, coupled with the object heretofore suggested, viz., to protect themselves against loss, if the parties to the notes should become of less responsibility by having authority to sell. If it was intended that Coffin & Haydock were to receive the proceeds of sales for their use, a guaranty of payment would have been useless, and in the place of it there should have been an agreement to pay from time to time the amount of sales made by Ball & Moore, absolutely. If the responsibility of Coffin & Haydock was merely that of guarantor, then the debts guaranteed must have remained the property of the party to whom the guaranty was given.

The construction I have given to the agreements of the parties, disposes of this case so far as the matters are before me on trial. It is only necessary to give the proper directions as to the account to be taken by the referee.

Coffin & Haydock are liable for all moneys received by them, either on collection, or sales of the notes received by them from Ball & Moore, and for all proceeds of sales which, in any way, have come to their possession.

They are also liable for any moneys not paid at maturity of the credits for goods sold by Ball & Moore, if any.

The plaintiffs are also entitled to demand and receive from Coffin & Haydock all notes in their possession, the proceeds of the sales of goods of the plaintiffs, which have not been paid for, by Coffin & Haydock, to the plaintiffs.

The plaintiffs are also entitled to any notes which have been transferred to the assignee Brown, under the assignment, and to receive from him the proceeds of all notes which have come into his hands since the assignment.

Coffin & Haydock having authority to sell the notes, the plaintiffs cannot follow any note sold by them for a *bona-fide* consideration, in the hands of other persons.

Referred to Mr. Yard to take the account, in pursuance of the above directions; and judgment ordered therefor, on filing his report.

The referee reported, and his report was confirmed upon exceptions, after argument at special term, April 14, 1863, and the amount due determined at $87,869.80, with interest from October 20, 1860.

Afterwards, July 27, 1863, before judgment was entered,* an order of arrest was granted upon affidavits setting forth substantially the foregoing facts.

Defendants thereupon moved, upon affidavits, to discharge the order of arrest.

The plaintiff alleged that the agreement of Ball & Moore with defendants had never come to the knowledge of Chaine & Son until after defendants' insolvency; and defendants claimed that it was made by their authority, and they had notice of its contents when it was made.

William Curtis Noyes, for the motion.—I. The plaintiff has adopted the agreement of Ball & Moore with defendants, and is bound by it. (Dexter *a.* Adams, 2 *Den.*, 646.)

II. This being an equitable action, the defendants are not liable to arrest herein, either upon an order or by *ne exeat.* (*Code*, § 178; Fassett *a.* Tallmadge, 14 *Abbotts' Pr.*, 188.)

III. The defendants' debt is not fiduciary in its character. (Goodrich *a.* Dunbar, 17 *Barb.*, 644; Angus *a.* Dunscomb, 8 *How. Pr.*, 14; Bussing *a.* Thompson, 15 *Ib.*, 97.)

Albert Mathews, opposed.—I. The right to have the defendants arrested in this action is grounded upon the cause of action set forth in the complaint. The complaint contains a statement of facts showing one or more of the causes of arrest required by the Code. (§§ 179, 288.)

II. The substantive facts constituting the cause of action cannot be made the subject of dispute, by affidavits, upon a motion to vacate an order of arrest. Unless it is made clearly to appear that the complaint will be dismissed upon the trial, the order of arrest will be retained. (Levins *a.* Noble, 15 *Abbotts' Pr.*, 475.)

III. The affidavits, etc., produced on the part of the defendants, do not legally controvert the substantial facts set forth in the complaint and affidavits of plaintiff.

IV. The cause has been tried, and all the issues material to the arrest of the defendants have been found in plaintiff's favor. The matters sought to be controverted, both of law and fact, on this motion, are therefore *res adjudicata.*

* Judgment was entered as against Coffin & Haydock, in December, 1863, for $108,245.02.

V. The indisputable facts of this case, therefore, require that the order of arrest should be retained, and the motion to vacate be denied, upon the principles ordinarily applied by this court to similar cases. (Dunaher *a.* Meyer, 1 *Code R.*, 87; Ostell *a.* Brough, 24 *How. Pr.*, 274.) 1. The defendants were never authorized to use the plaintiff's testator's moneys for their own benefit. They received the notes for account of plaintiffs. 2. No credit, in respect to these moneys, was ever given by plaintiff's testator to defendants. (Schudder *a.* Shiells, 17 *How. Pr.*, 420.) 3. Their sole authority to sell the notes was in order to protect themselves against the insolvency of the makers thereof. 4. They received the notes and proceeds solely for the use and benefit of plaintiff's testator, and in order to remit the proceeds to plaintiff. They had no greater or better rights than Ball & Moore, and stood in the same position. (Frost *a.* McCarger, 14 *How. Pr.*, 131.) 5. There was no authority derived from plaintiff's testator to make any disposition of the proceeds of the notes and goods, other than to hold the same for the exclusive use of the plaintiffs and remit the same to them. (Holbrook *a.* Homer, 6 *How. Pr.*, 86.) 6. Defendants never had authority, by consent, or contract, or custom, to use this money. They were mere fiduciary bailees of the notes and trustees of the proceeds, and guilty of a fraud in appropriating them to their own use. (Turner *a.* Thompson, 2 *Abbotts' Pr.*, 444; Stoll *a.* King, 8 *How. Pr.*, 298.) 7. The fact that the defendants guaranteed the sales of Ball & Moore, did not destroy their fiduciary relation to plaintiff's testator in respect to the notes and proceeds. They stood in no better plight than if they had been the immediate consignees of the goods, and had guaranteed their own sales. In either case, they are liable to arrest. (Ostell *a.* Brough, 24 *How. Pr.*, 274.) 8. The defendants were not bankers, but rather like an attorney, to whom plaintiffs' agents delivered the notes for collection and remittance.

Ingraham, J.—The question submitted on this motion to vacate the order of arrest was substantially decided on the trial of this cause.

The ground on which the order was granted was, that the debt was of a fiduciary character. It was on that theory that the decision at the trial was made. The notes and accounts

were considered the property of the plaintiffs, and placed in the defendants' hands for collection, and payment over to the plaintiffs, so as to limit their liability on the guaranty of the plaintiff. It was on this account that the judgment allowed the plaintiffs, to follow the notes to the hands of the assignees of the defendants, and to recover the possession from them.

I see no good reason for changing that view of the case, and the motion, therefore, must be denied.

BOLLES *a.* DUFF.

Supreme Court, First District; General Term, March, 1864.

APPEALABLE ORDER.—RECEIVER.—SECURITY FOR COSTS.—LEAVE TO SUE.

An order of court requiring a plaintiff acting in a representative capacity to give security for costs, under section 317 of the Code, is not appealable, except for irregularity in granting or procuring it.*

An order of court made *ex parte*, giving a receiver leave to sue, is not a bar to a motion to require such receiver to file security for costs.

Appeal from an order requiring security for costs.

This action was brought by Jesse N. Bolles, as receiver of John M. Trimble, a judgment-debtor, against Trimble, John A. Duff, and William H. Roberts. The action was brought pursuant to leave from the court. The action was to set aside an assignment and conveyance of real estate in New York city. The defendants moved that the plaintiff be required to give security for costs, the motion papers disclosing that the receiver had no funds in hand belonging to the estate of Trimble, and

* In JULIO *a.* INGALLS (*Supreme Court, First District; General Term, September,* 1863; Present, SUTHERLAND, INGRAHAM, and LEONARD, JJ.), it was *Held*, 1. That an order for the discovery of books and papers, under the Revised Statutes, is appealable. 2. An order requiring the deposit of all the account-books of a party with the clerk for ten days, is not sustainable in an ordinary case. 3. A petition for discovery must show the precise point on which information is desired.

no prospect of funds unless successful in this action. The motion was granted, and security was required in the sum of $500. The plaintiff appealed.

Benjamin C. Thayer, for the appellant.—I. The defendant Trimble has appeared: no motion has been made on his part to have the plaintiff file security for costs, yet the order compels the plaintiff to file security in a bond to the defendants, "severally and collectively." This is erroneous.

II. We have two orders in this action. One authorizing and directing the receiver to prosecute this action without filing any security for costs; and the other, requiring said receiver to file security in a bond to the defendants, "severally and collectively," and staying the proceedings herein until such bond is filed. This order is in direct opposition to the previous order, and is virtually and in substance a reversal of that order. There are but two ways to dispose of the previous order; one by motion to set it aside for irregularity or want of jurisdiction, the other by an appeal to the general term.

III. The plaintiff is not personally liable to the defendants for their costs of the action, unless the court directs the same to be paid by him personally for mismanagement or bad faith in such action. (*Code*, § 317; Stewart a Binsse, 4 *Bosw.*, 616; Devendorf *a.* Dickinson, 21 *How. Pr.*, 275; Carnahan *a.* Pond, 15 *Abbotts' Pr.*, 194; Darby *a.* Condit, 1 *Duer*, 599.)

IV. The security, when required, must in all cases be made to depend upon a judgment; that is, by its terms is not to be valid, unless a personal judgment for mismanagement and bad faith shall be rendered. (Darby *a.* Condit, 1 *Duer*, 599; Shepherd *a.* Burt, 3 *Ib.*, 645; St. John *a.* Denison, 9 *How. Pr.*, 343.)

V. Security cannot be required, under section 317 of the Code, of a person expressly authorized by statute to sue, merely upon the ground that the estate that he represents is insolvent. A receiver appointed under supplementary proceedings does not stand merely in the place of the debtor, but represents the creditors as well as the debtor. He is a trustee for all the parties. Section 298 of the Code forbids the appointment of more than one receiver for the same judgment-debtor, though there may be separate proceedings in favor of different creditors.

This shows that the receiver is a trustee for all. (Porter *a.* Williams, 9 *N. Y.* (5 *Seld.*), 142.)

VI. A receiver appointed under section 298 of the Code has the same power as one appointed under section 244; and by the last section the court is authorized to appoint receivers and grant the other provisional remedies.

Van Antwerp & James and *Rocellus S. Guernsey*, for the respondent.—I. The provisions of the Revised Statutes relating to security for costs, say: "§ 1. When a suit shall be commenced in any court, for or in the name of the trustees of any debtor, the defendant may require such plaintiff to file security for the payment of the costs that may be incurred by the defendant in such suit or proceeding." (2 *Rev. Stat.*, 620; Gomez *a.* Garr, 18 *Wend.*, 577.) Those provisions of the Revised Statutes are not affected by the Code, and are still in force. (Gardner *a.* Kelly, 2 *Sandf.*, 632.)

II. The first division of section 317 of the Code is for the protection of trust-estates, and is the same in effect as the provisions of previous statutes relating to trust-estates, and more comprehensive. Subdivision 3 extended the power of the court to require security from parties which the Revised Statutes did not cover, and to prevent oppressive litigation. (2 *Rev. Stat.*, 2 ed., 511, § 18; *Ib.*, 514, § 38.)

III. The courts never would encourage litigation in such a manner as to make the defendant suffer costs in any result of the action. (Isnard *a.* Cazeau, 1 *Paige*, 39; Benedict *a.* Jones, 18 *Wend.*, 557; Coryell *a.* Davis, 5 *Hill*, 559.)

IV. The above provisions of the Revised Statutes being still in force, defendants, in actions of this character, are entitled to its benefit as a matter of right, independent of any discretionary power of the court.

V. The court below having exercised the discretionary power given it by section 317 of the Code, and ordered the plaintiff to give security for costs, this court will not, on appeal, review such order. The appeal should therefore be dismissed. (Taylor *a.* Seeley, 3 *Code R.*, 85; Seeley *a.* Chittenden, 10 *Barb.*, 303.)

By the Court.—Clerke, J.—An order of a court, requiring

a party to an action, acting in a representative capacity, to give security for costs, is discretionary. (*Code*, § 317.) Therefore, on the merits, the order requiring the plaintiff in this action to give security for costs is not appealable, and it is only on the ground of irregularity in procuring or granting it that we can interfere. It is contended by the counsel for the plaintiff, that as the court at special term, held by another judge, granted an order allowing the plaintiff to commence and perfect this action, that this exonerated him from all liability for costs, and debarred the defendants from subsequently applying for an order requiring him to give security for the same; and that such subsequent order is a reversal of the previous order. This, I think, is not strictly correct.

The first order was *ex parte*, and not conclusive. It was granted on the petition of the receiver, without giving the defendants any opportunity of being heard, and was revocable on motion, on due notice to the plaintiff, and on hearing both parties. The first order, like the second, was discretionary; and as it was, therefore, not appealable, the defendants would have no remedy, if it could not be modified or revoked by a subsequent order of the court. If this could not be done, receivers could, nearly in every case, commence reckless and oppressive actions, without any danger of liability; for they can, very generally, on their own *ex-parte* petition, when duly verified, obtain an order allowing them to commence an action; and as I have said, if this be deemed conclusive, they can always escape liability for mismanagement or bad faith in commencing or conducting the action.

The appeal should be dismissed, with costs.

Leonard and Sutherland, JJ., concurred.

LOWBER *a.* KELLY.

New York Superior Court; Special Term, December, 1861.

LAND HELD ADVERSELY.—VOID DEED.—STATUTE OF MAINTENANCE.—PARTIES.

The grantee of land held adversely to the grantor, cannot maintain an action upon the deed against the person thus holding adversely, even though such grantee had no knowledge of the adverse possession.

Where L. received from W. a deed of land which was held adversely by K., and, on W.'s refusal to bring ejectment, L. commenced an action against K. and W. to establish W.'s legal, and L.'s equitable title, W. not defending,—*Held*, that the action could not be maintained against K.

Demurrer to the complaint.

This action was brought by Elizabeth G. Lowber against William Kelly and Gabriel Winter. It appeared from the complaint that Winter had conveyed to plaintiff certain land in New York city, of which Winter was the owner in fee, but of which Kelly was in possession. The substance of the complaint sufficiently appears from the opinion. The demand for judgment was as follows:

"Wherefore the plaintiff prays for a judgment of this court, declaring and adjudging that as between the defendants, William Kelly and Gabriel Winter, the title to said property in fee-simple, is vested in the said Winter, and that he is entitled to the possession thereof; and that, as between the said defendant Gabriel Winter and this plaintiff, the title to said property in fee-simple is vested in said plaintiff, and that the said defendant, William Kelly, surrender to the plaintiff the possession of said premises, and pay her the said sum of two thousand dollars for the withholding of the same, and for such other and further relief as the court may see fit to grant."

Winter did not answer or demur. Kelly demurred on the grounds—1. That the complaint did not state facts sufficient to constitute a cause of action against him. 2. That there was a

defect of parties-defendant. 3. That several causes of action had been improperly united.

David P. Hall, in support of the demurrer.—I. The suit is for possession and the demurrer is well taken, because it appears by the complaint, that the defendant Gabriel Winter was out of possession of the premises described in the complaint, at the time of his grant to the plaintiff, and that the defendant William Kelly was then in possession of said premises, claiming under a title adverse to that of the plaintiff. The grant was, therefore, void under the statute of maintenance. (1 *Rev. Stat.*, 739, §§ 147, 148.)

II. The demurrer is well taken, because several causes of action are united in one complaint, a part against Kelly, and a part against Winter; the action is, in fact, an experiment to ascertain if in one suit the plaintiff can obtain judgment declaring that Winter owns the premises in fee, and is entitled to possession thereof, as against Kelly, and that the plaintiff owns and is so entitled as against Winter, and therefore may recover against Kelly in equity, although it is tacitly admitted that Lowber, the plaintiff, must fail in her action if Winter were not a party. This cannot be done; first, because it makes the complaint multifarious; second, because there is a misjoinder of parties-defendant: one having an interest, and the other having no interest in the premises in controversy. The complaint must show that each person named as defendant has or claims an interest in the matter in controversy. (Pinckney *a.* Wallace, 1 *Abbotts' Pr.*, 82.)

III. The complaint does not state facts sufficient to constitute a cause of action, because it fails to state, that Gabriel Winter, the plaintiff's grantor, was possessed of the premises granted at the time of his grant to the plaintiff, and fails to state that he ever was possessed of said premises.

IV. The plaintiff's complaint does not state facts sufficient to constitute a cause of action against the defendant Winter, because the plaintiff, by taking a deed which the statute declares to be void, and which confers upon the plaintiff no right, as against Kelly, did not acquire thereby any equity which entitles her to require the defendant Winter, on being indemnified, to bring a suit to recover the possession of the premises for her, nor (on his refusing to do so) to maintain a suit against Kelly and

Winter in her own name, to recover possession of the premises as against Kelly. Hence there was here a palpable misjoinder of parties defendant—the provisions of the Code not warranting the making Winter a party, for the purpose claimed in the complaint. (Denio, J., in Child *a.* Chappell, 9 *N. Y.* (5 *Seld.*), 259; Pinckney *a.* Wallace, 1 *Abbotts' Pr.*, 82.) Here the defendant, Gabriel Winter, never was the actual occupant of the premises, nor was he in possession of the same at the time of the grant; neither does it appear that he has, or that he claims to have, any interest in the matter in controversy.

James H. Coleman and *Ira Shafer*, opposed.—I. There is no pretence that this is an action at law against Kelly, founded upon the conveyance from Winter to the plaintiff, and hence the cases which hold the familiar doctrine that a grant of lands is void, if, at the time of the delivery of the grant, the lands are in the actual possession of a third person claiming under a title adverse to that of the grantor, are not controlling. These cases would be fatal to the plaintiff's action, if it were an action at law between the plaintiff and the defendant Kelly. But such is not the case, nor is such the theory upon which this action proceeds. It is conceded by the demurrer, that as between Winter and Kelly, that the former is the owner in fee of the premises in question and entitled to the possession thereof, and that the latter has neither the fee nor the right to the possession, and, therefore, wrongfully holds the same. That Winter, as against Kelly, is the legal and equitable owner of the premises, and is legally and equitably entitled to the possession of the same; that as between the plaintiff and Winter, in virtue of the conveyance from the latter to the former, that the former is the lawful and equitable owner of the lands sought to be recovered, and is entitled to the possession of the same. Thus it will be observed that we have it established that Winter is seized in law of the premises as against Kelly, and that the plaintiff is seized in law as against Winter. Kelly is without title and wrongfully in possession; Winter as against Kelly has the fee and is entitled to the possession; the plaintiff as against Winter is seized in fee and rightfully should be in possession. It is submitted that the legal right and the equitable right are united in the plaintiff. The defendant Winter makes default, and therefore must

be regarded as assenting to the relief prayed for. It is no objection for Kelly to interpose, that the conveyance from Winter to the plaintiff may be, for aught that appears, a quit claim. Winter might have answered any facts showing that, in equity, the plaintiff was not entitled to any relief as against him, but he is content. It is believed that it is entirely immaterial by what kind of conveyance the plaintiff has the title, so long as it is lawful. The fact that the plaintiff fails to aver want of knowledge of Kelly's possession does not affect her rights. The grantor is supposed to know the situation of the lands he sells, but not so with the grantee. (Williams *a.* Jackson, 5 *Johns.*, 489, 500.)

II. The plaintiff's right to the relief demanded is sustained by authority. "The statute of maintenance has come to be considered with a good deal of disfavor," and the same may be said of the statute relied upon by the defendant. (Humbert *a.* Trinity Church, 24 *Wend.*, 587, 611; Hoyt *a.* Thompson, 5 *N. Y.* (1 *Seld.*), 320, 347; Sedgwick *a.* Stanton, 14 *N. Y.* (4 *Kern.*), 289.) The law as to maintenance and champerty is not in force in this State, except as contained in our statutes. (*Ib.*) "No reason exists for giving the champerty act a liberal or enlarged construction; it is the relic of an ancient policy which has been treated with but little favor by either legislatures or courts in modern times." (Crary *a.* Goodman, 22 *N. Y.*, 170, 177.) The maxim that there is no "wrong without a remedy," means, in one sense, "the means given by the law for the recovery of a right," and "whenever the law gives any thing it gives a remedy for the same." (3 *Bl. Com.*, 123; *Brooms' Leg. Max.*, 146, 147.) The remedy that the plaintiff seeks has been recognized and adjudged from an early day, in several cases in this State, and in Massachusetts. (Jackson *a.* Vredenbergh, 1 *Johns.*, 159; Jackson *a.* Brinkerhoff, 3 *Johns. Cas.*, 101; Williams *a.* Jackson, 5 *Johns.*, 489, 499; Jackson *a.* Leggett, 7 *Wend.*, 377; Livingston *a.* Proseus, 2 *Hill*, 526; 4 *Kent's Com.*, 487, 7 ed.; Wolcot *a.* Knight, 6 *Mass.*, 418; Brinley *a.* Whiting, 5 *Pick.*, 348.) The title is not extinguished, but remains in the grantor, who recovers for the benefit of the grantee. (Livingston *a.* Proseus, 2 *Hill*, 526, 529.) Recovery was accomplished under the old practice in a case like this, by inserting "counts in the declaration, on the title of the

grantor and the grantee, so that if the suit failed as to the one, it might succeed as to the other." (Livingston *a.* Proseus, 2 *Hill*, 526, 530; 2 *Burr. Pr.*, 314; Ely *a.* Ballantine, 7 *Wend.*, 470; *Adams' Eject.*, 188.) While it was proper before and after the adoption of the Revised Statutes to count upon demises from different lessors, and claim and recover on different titles, and to insert in the declaration as many counts as the plaintiff pleases, yet there is no such practice authorized by the Code. (St. John *a.* Pierce, 22 *Barb.*, 362.) While the Revised Statutes abolished the use of fictitious names of plaintiffs and defendants, and of the names of any others than the real claimants and defendants, yet the declaration might contain several counts, and several parties might be named as plaintiffs, jointly in one count and separately in others. (2 *Rev. Stat.*, 304, § 6; Ely *a.* Ballantine, 7 *Wend.*, 470.) And if the plaintiff, under the old practice, had made Winter one of the lessors without his permission, his name would not have been stricken out of the declaration on his motion. (*Adams' Eject.*, 188, 189; Ely *a.* Ballantine, 7 *Wend.*, 470; Doe *a.* Figgins, 3 *Taunt.*, 440.) Thus it will be seen that before the Code and under the law as it existed before the Revised Statutes, and according to the then provisions, the plaintiff would have had an adequate remedy and could have successfully maintained the action. The action is brought, according to the provisions of the Code, by the plaintiff, who is "the real party in interest." (*Code*, § 111.) Winter is joined as a defendant in the action as "a necessary party to a complete determination or settlement of the questions involved therein." (*Code*, § 118.) And "the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in." (*Code*, § 122.) The plaintiff cannot compel Winter to sue. If the action were to be brought in his name, it might be doubtful whether it could be maintained, inasmuch as he is not "the real party in interest." If section 455 of the Code does not enable the plaintiff to avail herself of the provisions of the Revised Statutes, as has been adjudged, then the Code must furnish a remedy, or she is without any, although the distinction between legal and

equitable remedies has been abolished and both may be pursued in one action. (St. John *a.* Pierce, 22 *Barb.*, 362; Dobson *a.* Pearce, 12 *N. Y.* (2 *Kern.*), 156.)

III. The law has no such tender regard for a wrong-doer,—a trespasser as Kelly confesses himself to be,—as to enable him to raise objections that Winter does not raise, but expressly waives by making default, and which Winter could not raise because of the estoppel created by his deed. (4 *Com. Dig.*, 76, 81, (A.) (D).) "But as between the parties to the deed, it might operate by way of estoppel and bar the grantor." (4 *Kent's Com.*, 487, 7 ed.; Jackson *a.* Demont, 9 *Johns.*, 55; Livingston *a.* Peru Iron Co., 9 *Wend.*, 511, 516; Van Hoesen *a.* Benham, 15 *Ib.*, 164.) Winter cannot claim as against his own deed, whether it is an estoppel or not. (Jackson *a.* Bull, 1 *Johns. Cas.*, 81, 90; Jackson *a.* Stevens, 16 *Ib.*, 110, 115.) A quit-claim deed passes all the title of the grantor *in esse* as well as a warranty-deed. The latter conveyance, by way of estoppel to prevent circuity of action, passes a subsequently acquired title of the grantor. (Jackson *a.* Wright, 14 *Johns.*, 193; Jackson *a.* Hubble, 1 *Cow.*, 613, 617.)

IV. What the grantee accomplished before the Code indirectly, and by means of a legal fiction in a case like the present, we seek to accomplish directly by a statement of the facts of the case as they exist. Every action now is emphatically an action on the case, and before the Code, upon the facts stated in our complaint, the plaintiff would have recovered. "If the doctrine contended for by the counsel for the defendant is to prevail, a person who is in possession of land without title may hold it forever." (Williams *a.* Jackson, 5 *Johns.*, 489.)

Bosworth, Ch. J.—One ground of demurrer is, that the complaint does not state facts sufficient to constitute a cause of action. The action is brought to recover possession of certain real estate described in the complaint.

The defendant Kelly insists that the complaint shows, that at the time of the delivery of the deed to the plaintiff, under which she claims title and a right to immediate possession, Kelly was in the actual possession of the land in question, under a claim of title adverse to that of the plaintiff's grantor. The plaintiff insists that the complaint does not show that

Kelly was in the possession of the land at the time of the conveyance to her, but only that he now claims that such was the fact.

If the plaintiff's whole right to recover is based on a deed to her, which was executed and delivered at a time when the lands were actually possessed by Kelly under a claim of title adverse to that of the plaintiff's grantor, she cannot recover in this action. Such a deed is absolutely void as to the defendant Kelly, and would convey no rights, as against him. (1 *Rev. Stat.*, 739, § 147; Burhans *a.* Burhans, 2 *Barb. Ch.*, 398; Jackson *a.* Demont, 9 *Johns.*, 55; Jackson *a.* Oltiz, 8 *Wend.*, 440; Cole *a.* Irvine, 6 *Hill*, 634.) The grantee in such a deed cannot maintain an action upon it against the person thus holding adversely or those succeeding to his rights, whether knowledge of the adverse possession was brought home to her or not, although as against all the rest of the world, the deed is valid, and passes the title from the grantor to the grantee. (Livingston *a.* Proseus, 2 *Hill*, 526; Keneda *a.* Gardner, 4 *Ib.*, 469; *Wil. Real Est.*, 360, 361.)

The complaint states that on the 17th January, 1848, one Gabriel H. Winter was "the owner in fee" of the land in question; that he "continued to own and hold said premises in fee-simple down to the 20th day of June, 1848, when he died, leaving him surviving, the defendant, Gabriel Winter, sole and only heir at law."

That Gabriel Winter having thus "become the owner in fee" of the said real estate, continued to be such owner down to the 14th of September, 1860, on which day "he duly executed, under his hand and seal, and acknowledged and delivered to the plaintiff his certain deed in writing, whereby the said Winter granted and conveyed to the plaintiff, to hold to her and her heirs forever, the real estate" in question; that the plaintiff has not conveyed, or in any way parted with, any right or interest acquired by virtue of said conveyance, and "she now claims to be the owner, in fee-simple, of said premises, and is entitled to the exclusive possession and enjoyment thereof."

That Kelly "now claims and insists, that at the time of the execution and delivery to the plaintiff, of the aforesaid conveyance and of the grant of the premises therein referred to, such premises were in his actual possession, and that he then claimed

said lands under a title adverse to that of the said defendant, Gabriel Winter, the grantor of the plaintiff."

That the plaintiff "was, at the time of the execution and delivery of the aforesaid conveyance, entirely ignorant, and was not informed, nor had she any knowledge or intimation of any kind, till long thereafter, that said defendant, William Kelly, claimed such premises under a title adverse to that of the said defendant, Gabriel Winter.

"That she has often, subsequent to the delivery to her of the conveyance aforesaid, requested the said defendant, Kelly, who then was, ever since has been, and still is, in possession of said premises, to deliver up to her the possession thereof, but that he has utterly refused to comply with said request."

The complaint further alleges that the plaintiff, since the delivery of the deed to her, "has applied to the defendant, Gabriel Winter, for leave to commence an action in his name . . . . for the purpose of evicting him, the defendant Kelly, from the aforesaid premises, and offered to indemnify said Winter against the payment of any costs, and that said Winter has failed and refused to comply with this request, and she is advised and insists that the said . . . . Winter is a necessary party to a complete determination or settlement of the questions involved in this suit."

That by reason of the non-delivery of possession to her, she has sustained damages to the amount of two thousand dollars.

It prays for a judgment, "that as between the defendants William Kelly and Gabriel Winter the title to said property in fee-simple is vested in the said Winter, and that he is entitled to the possession thereof; and that as between the said defendant Gabriel Winter, and the plaintiff, the title to said property in fee-simple is vested in said plaintiff; and that the said defendant William Kelly surrender to the plaintiff the possession of said premises, and pay her the said sum of two thousand dollars for the withholding of the same, and for such other and further relief as the court may see fit to grant."

It will be observed that the plaintiff does not deny that Kelly was in possession claiming under a title adverse to that of her grantor, at the time of the grant to her. She avers that she did not then know that he so claimed, but does not aver that he did not, in fact, then so claim; nor does she aver that she did not

then know that he was in the actual possession of the property at that time.

I think that the words "then was," contained in her allegation of her having requested Kelly to deliver to her the possession of the property, refer, and were intended to refer to the time of the delivery of the deed to her, under which she claims.

On no other theory is there any apology for the averments that she had requested Winter to allow her to sue in his own name. Such a request would be unintelligible except upon the ground that her deed gave her no rights as against Kelly. And the presence of Winter, as a party to this suit, has no apology, except upon the theory that the complaint shows, and was intended to show, that, at the time of the delivery of the deed from him to the plaintiff, Kelly was in the actual possession claiming under a title adverse to that of Winter. On that theory what the prayer of the complaint means can be understood, but on no other. That is framed on the idea, that on the facts stated, Winter had the actual title, but that the deed he gave to the plaintiff was ineffectual to transfer it, and is void as to Kelly—but that as between the plaintiff and Winter she has succeeded to his rights.

And the action is an experiment to ascertain if, in one suit, and that brought by her as the plaintiff, she can obtain a judgment declaring that Winter owns in fee and is entitled to possession as against Kelly; and that the plaintiff owns and is so entitled as against Winter, and therefore she may recover against Kelly as a logical sequence and strict equity, although she must fail in her action if Winter were not a party.

I construe the complaint as showing that at the time Winter conveyed to the plaintiff, Kelly was in the actual possession of the lands granted under a claim of title adverse to that of her grantor. The deed to the plaintiff was absolutely void as to Kelly; Winter might have executed a mortgage of the lands, but even that would only bind the lands from the time the possession thereof should be recovered by Winter or his representatives. (1 *Rev. Stat.*, 739, §§ 147, 148.) The object of the revisors in recommending permission to mortgage, in such cases, is stated in 3 Rev. Stat., 2d ed., 596, § 185. It was no part of that object to allow the mortgagee to bring a suit of any kind, as such mortgagee, until after his mortgagor or the representatives of the lat-

ter had recovered possession of the premises, for until that event has occurred the mortgage is not to bind the lands.

I cannot think that the plaintiff, by taking a deed which the statute declares to be void, and which confers upon her no right as against Kelly, thereby acquires an equity which entitles her to require her grantor, on being indemnified, to bring a suit to recover possession, or, on his refusing to do that, maintain a suit in her own name (to effect that object) against Kelly and her grantor. And besides all this, her deed for aught that appears is merely a quit-claim deed, without other consideration which can be presumed, than such as is sufficient to make it operative as a conveyance, as between her and her grantor.

I think the demurrer is well taken, and that the defendant Kelly is entitled to judgment. It does not appear to me that leave should be given to amend the complaint. If there be any cause for granting such liberty, it may be shown on settling the order or judgment to be entered herein, which will be settled on three days' notice to the adverse party.

BARTLETT *a.* HATCH.

Supreme Court, First District; Special Term, April, 1864.

NATURE OF CAUSES OF ACTION.—CAPACITY TO SUE.—ACTIONS BETWEEN CO-TRUSTEES.

A surviving assignee in trust cannot maintain an action against the executors or administrators of a deceased co-assignee, to require them to account for and pay over money collected by the deceased as such assignee. The *cestuis que trust* are the proper plaintiffs.

A complaint against executors, &c., seeking to charge them in their representative capacity, cannot be sustained on demurrer, if the facts alleged show only a personal liability on their part.

It seems, that a trustee may maintain an action against his co-trustee to restrain a violation of duty, and even succeed in obtaining his removal.

Demurrer to the complaint.

This action was brought by Abner Bartlett, surviving assignee of one Michael Burke, against Roswell D. Hatch and Eliza H. Hogan, executor and executrix of Robert Hogan, deceased, who had been in his lifetime a co-assignee with Bartlett. The assignment was in trust for the benefit of creditors. The assignees had entered upon their duties, and several years after the inception of the trust, Hogan died. In this action the plaintiff sought to obtain an accounting to recover from Hogan's executors moneys received by Hogan in his lifetime, and also to charge the defendants with moneys collected by them since Hogan's death, which should have been paid to the surviving assignee directly. The defendants demurred, on the grounds that the plaintiff had not legal capacity to sue, that he was not the proper party to bring the action, and that several causes of action had been improperly united, with other objections, not deemed material here.

Roswell D. Hatch and *Edward P. Cowles*, in support of the demurrer.

John B. Fogerty and *William Fullerton*, opposed.

Marvin, J.—The trust created was valid, and the property conveyed or assigned was vested in Bartlett and Hogan, as trustees, and Burke ceased to have any right to the property, or to the rents and profits thereof, until the purposes of the trust should be satisfied.

Burke, the assignor, had no right to the rents, by reason of the negligence of the assignees in selling the property and paying the debts. The trustees held the property for the benefit of the *cestuis que trust*, and it was their duty to sell it and use the proceeds in paying the debts. Their neglect to do so was a breach of trust; but the rents which were received by them, or either of them, belonged in equity to the creditors. In other words, they were accountable to the beneficiaries for the rents received jointly by them, and each one was liable for the amount he solely received. Thus it is seen that I do not assent to the argument that the rents belonged to the assignor, Burke, until the assignees should execute the trust to sell.

One of the grounds of demurrer is that several causes of ac-

tion have been improperly united. The plaintiff seeks to recover the money received for rents by Hogan, his co-trustee, and this is one of the causes of action set forth in the complaint. He also seeks to recover of the defendants, as the representatives of Hogan, the money which they have received since Hogan's death, on account of the rents; the defendants having, it is alleged, received the money as the executor and executrix of Hogan. It is very clear to my mind that these two causes of action cannot be united, or rather the defendants cannot be made liable in their representative character for the rents received by them. They had no claim, as executor and executrix of Hogan, to these rents. They did not belong to Hogan's estate. The receipt of these rents was wrongful, but the estate of Hogan is not liable. The defendants are undoubtedly liable, in their individual character, to the plaintiff. But the facts stated do not constitute a cause of action against the defendants, as the representatives of Hogan, and the demurrer upon the ground that the facts stated do not constitute a cause of action, applies to this alleged cause of action.

It remains to consider whether the plaintiff can maintain the action against these defendants for the rents collected and misappropriated by his co-trustee, Hogan. He alleges, in substance, that upon the execution of the instruments by which they became trustees, Hogan entered into possession, and upon the collection of the rents, issues, and profits of all the lands, &c., of him, Burke, in the city of New York, and until, &c., continued to receive all the rents, &c., and had kept and exercised the entire control and management of the assigned estate and of the rents, &c., to the exclusion of the plaintiff, and made divers payments on account of the estate, &c., and except such payments Hogan had made no payments, &c., and although often thereto requested, he has never accounted for or paid over to the plaintiff the residue of the rents, &c., but has retained and converted the same to his own use. The allegations in the complaint, here abridged, are quite ambiguous and uncertain; but as they were understood by counsel, and as I understand them, they amount to this, or were intended to: that Hogan, for a certain period, collected and received the rents, &c., of the property assigned, and used portions of them for his own purposes. There is also another period mentioned in the

complaint when the like facts occurred, and the plaintiff now demands that the defendants, as the representatives of Hogan, account for such moneys to the plaintiff's surviving assignee, and pay over, &c., and that he have judgment, &c.

In my opinion, the facts stated in the complaint do not entitle the plaintiff to any judgment against the defendants, as the representatives of Hogan. What was the relation between the plaintiff Bartlett, and Hogan? They were co-assignees—trustees having equal powers, interest, and authority. They were to act jointly, and not separately. A trustee receiving money, is, however, generally alone accountable, unless the concurrence of the other trustees involves culpable negligence. One trustee may be liable for an abuse of trust by his co-trustee. (See *Greenl. Cruise on Real Prop.*, 445, and note; 2 *Story's Eq.*, 1282–1284; 4 *Kent's Com.*, 307, note.) But to whom are trustees, or a trustee, accountable? Most clearly to the *cestui que trust.* In case of default by one of the trustees, he generally is alone liable; but his co-trustee may be liable for neglecting to protect the trust property, knowing that his co-trustee is abusing his trust. From this, I think it follows, that in a case where the trustee has not the ability to protect the property from the abuse of trust by his co-trustee, without a resort to a Court of Equity, he may resort to such court for his own protection, and the protection of the trust property, and it may be his duty to do so. But what relief may he have? Can he compel his co-trustee to account to him, and to pay over the proceeds of the trust property? I apprehend not. He has no exclusive right to the property or its management. The relief may perhaps be an accounting for the benefit of the *cestui que trust* and payment over to him, thus relieving the co-trustee from liability. But I doubt even this. If a trustee has concurred in the breach of trust by his co-trustee, or has neglected to interpose for the protection of the trust property to an extent making him liable, I doubt whether the court will give him relief for the past acts of his co-trustee, or from the consequences of his own culpable negligence. I have, however, no doubt that a trustee may, in case of a threatened breach of trust by his colleague, institute an action for the purpose of restraining the threatened act, and it may be his duty to do this for his own protection and the protection of the property,

as it is the duty of every trustee to protect the trust property and faithfully execute the trust; and if he cannot do these without the aid of the court, I see no reason why he may not resort to the court for such purpose. And it may well be that upon his complaint an unfaithful trustee may be removed. I am reasoning upon general principles. I am not aware of any case in point, and I am not referred to any authority. But the present is, in no sense, such a case. In this case, Hogan, according to the allegations in the complaint, received the rents, &c., from August, 1854, to December, 1855, and then from November, 1859, to November, 1861, and retained and converted portions of them to his own use, and the plaintiff asks that the representatives of Hogan account to him for such rents, &c., and that he may have judgment in his favor against them for $15,239.59. In my opinion, he cannot maintain this action founded upon this claim. The *cestuis que trust* can maintain the action, and they are the proper plaintiffs. They may join Bartlett in an action as defendant with the representatives of Hogan, and it will then appear whether he is liable, by reason of his negligence or concurrence, for the breach of trust by his co-trustee, Hogan.

Suppose this action should be sustained, and Bartlett should recover of these defendants—what then? Would such recovery protect the defendant against the claim of the *cestuis que trust* in an action by them? Most clearly not. The money was received by one of the trustees, whose duty it was to pay it over to the *cestuis que trust*, and for this breach of duty he was liable to them, and this liability will not be discharged by a recovery in favor of the plaintiff, Bartlett. In short, Bartlett has no greater right to the money than his co-trustee, Hogan, had, and he can maintain no action to recover it. As to the money received by the defendants, it belonged to the plaintiff, Bartlett, as the surviving assignee, and when he brings his action against them in their individual capacity, he will, I have no doubt, recover judgment.

They will not be permitted to raise the question, or rather it will not avail them, that the trust was to sell the property and pay the debts, not to lease it, or leave it on lease and receive the rents. The *cestuis que trust* can enforce the execution of the trust, and so may the assignee; but, in the mean time, the

rents received will belong, in equity, to the *cestuis que trust*, and the trustee will be accountable to them. There must be judgment for the defendants upon the demurrer, with leave to the plaintiff to amend his complaint, if so advised, upon payment of costs.

HUNT *a.* CONNOR.

Supreme Court, First District; General Term, March, 1864.

EXECUTORS' AND ADMINISTRATORS' COSTS ON APPEAL.

The provisions of the Revised Statutes (2 *Rev. Stat.*, 90, § 41,) forbidding the recovery of costs against executors or administrators, except in certain cases, and referred to in section 317 of the Code, apply only to the general costs of the action, and have no reference to appeal or interlocutory costs.

Appeal from an order allowing costs of appeal to the plaintiff.

This action was brought by Samuel J. Hunt against Catharine A. Connor, administratrix of John H. Connor, upon a note of $3,729.13 made by defendant's testator. The case was three times tried, resulting, on the first two occasions, in a verdict for defendant: the third trial resulted in a verdict for the plaintiff. The further facts sufficiently appear from the opinion. The defendant appealed.

Robert A. Adams, for the appellant.

Jesse C. Smith, for the respondent.

CLERKE, J.—I think the provisions of the Revised Statutes, as to costs against executors and administrators, referred to in section 317 of the Code, apply only to the general costs of the action, and have no reference to appeal or interlocutory costs. The statute relating to costs in error or appeal is general,—that the successful party shall recover costs, without any exception in favor of executors or administrators; and, as Justice

Bronson says in Judah *a.* Stagg (22 *Wend.*, 641), "We are not authorized to make an exception which the Legislature has not thought proper to make."

The respective orders of the general term, in the case before us, provide that costs should abide the event, and the amount and items adjusted appear to be correct.

The order should be affirmed, without costs, however.

LEONARD and SUTHERLAND, JJ., concurred.

COLLYER *a.* COLLINS.

Supreme Court, First District; General Term, March, 1864.

CONTRACT.—USAGE.—OPINION OF WITNESS.—EXTRA WORK.—FORMER RECOVERY.—ANOTHER ACTION PENDING.—AMENDMENT OF PLEADING.—VARIANCE.—FORM OF EXCEPTION.

Where a contract has been made for the construction of a thing—*e. g.*, a vessel, at a fixed price, the contractor cannot recover additional compensation, as for extra work, merely upon proof that such work was done at the defendant's request, and that he accepted the work when completed. The defendant's request, in the absence of further evidence, is deemed merely a notice of his claim that the contract calls for such work.

An exception need not be more specific than the conclusion or finding to which it is taken.

Thus, where the only conclusion of law was, "that the defendant is indebted," etc.,—*Held*, that a general exception was sufficient to authorize the general term to review the various rulings implied by this conclusion.

The recovery of judgment by defendants against plaintiff having been given in evidence by way of set-off, the defendants are at liberty to avail themselves of such recovery as an estoppel, if the record so warrant, without regard to the theory of the answer.

A judgment in favor of the owner of a vessel against the builder, for damages for a failure to complete the vessel according to contract, is a bar to an action by the builder for extra work performed during the building of the vessel. (SUTHERLAND, J.; to the contrary, LEONARD, J.)

The fact that the plaintiff has availed himself of his cause of action as a counter-claim against the present defendants in an action still pending, is a bar to his action. (SUTHERLAND, J.; to the contrary, LEONARD, J.)

A plaintiff who has set up his cause of action as a counter-claim against the same

parties in a previous suit, should be put to his election between the two modes of relief, but is not otherwise barred by the pendency of the former action. (LEONARD, J.; to the contrary, SUTHERLAND, J.)

In an action where the defendant may set up his counter-claim or set-off in answer to the plaintiff's demand, he has his election to do so or to bring a cross action. (LEONARD, J.)

Though the meaning of terms used in a contract may be determined by usage, it is not competent for a witness familiar with the usage to testify as to what construction the contract bears. (LEONARD, J.)

Appeal from a judgment entered upon the report of a referee.

This action was brought by George Collyer against George Collins, William G. Murray, Robert McLaughlan, James K. Thompson, Edward Soper, John Griffiths and John Lamb, survivors of William Woolsey, to recover $3,066.28, the amount of certain extra work which plaintiff claimed to have performed upon the schooner John Griffiths. The plaintiff had contracted to build, finish, and launch the schooner for $9,500. There were some specifications in the contract which are not deemed material on this appeal. The defendants had accepted the schooner, paid the contract price and $102.34 for extra work, and procured from plaintiff this receipt: "Received, Jersey City, July 7th, 1854, of George Collins, $2,000, being the last payment on schooner John Griffiths; also $102.34 extra work on above schooner." (Signed) "George Collyer." Subsequently the defendants commenced an action against the present plaintiff in the Supreme Court of New Jersey, summoning him to answer, as appeared on the record, "of a plea of trespass on the case upon promises: For that, etc." The nature of the demand, in that action, was a claim for damages for a breach of the contract for constructing the schooner, in certain specified particulars. Collyer appeared in that action and pleaded the general issue. The action was tried by a jury who found a verdict in favor of the present defendants for $1,500: judgment was entered and the present defendants brought an action upon the judgment in this State: Collyer set up his present cause of action as a counter-claim. Afterwards, Collyer brought this action. The other facts sufficiently appear from the opinion. In this action Collyer had judgment for a balance found due him for extra work, after deducting the New Jersey judgment. The defendants appealed

Charles Matthews, for the appellants.—I. The judgment in New Jersey was properly set up in defendant's answer in this case. Even before the Code, the weight of authority would have sustained this plea as a bar sufficiently set forth. (1 *Greenl. Ev.*, § 531.)

II. The record of the judgment, having been admitted in evidence, formed a complete bar to this action. The record itself shows that the same matters which form the gist of the plaintiff's action was necessarily tried in the action in New Jersey. And the jury in that case found, as a matter of fact, that the vessel, as delivered, with every thing plaintiff claims as extra on her, was not as good a vessel as the contract called for, in the sum of $1,567.57.

III. The offer of the defendants to prove that an action is, and was pending at the commencement of this suit in the Supreme Court of this State, in which the defendants in this action were plaintiffs, and the plaintiff herein was defendant, and in which the same matters litigated here were set up by way of counter-claim, by Collyer, was improperly rejected by the referee as immaterial.

IV. The contract for the building of the vessel calls for the expenditure of all the work and materials claimed by Collyer to be extra. It is a well settled rule of law that the terms used in a contract shall prevail according to their popular and comprehensive sense, unless there be something to show they were meant to be used in one more confined. (*Chit. on Con.*, 79.) If there be two clauses in a contract so totally repugnant that they cannot stand together, the former shall be received and the latter rejected. (*Shep. Touch.*, 88; 1 *Steph. Com.*, 464.)

V. The referee, in his opinion, says he allows as extra all the materials used in the fastening of the vessel, and the labor performed therein, and the charge for hawser pipes. Now it is in evidence, on the part of the plaintiff, that the rule amongst ship-carpenters, when they undertake to do ship-carpenter's work, is to put in enough spike-fastening to hold the plank, and now and then a treenail at the heavy sets. It is admitted on all sides that some spike-fastening properly came under the head of ship-carpenter work. Yet we are charged with, and the referee allows as extra, all of the work and materials furnished in the fastening of this vessel below light-water mark;

also the charge for cast-iron hawser pipes. The plaintiff could only recover for the difference between that which he was bound to furnish, and that which he did provide, but he has given no proof by which this amount can be determined, either as to the labor of driving or the difference in value of the iron spike he admits he would have been obliged to use, and the copper he did use.

VI. There is no precedent for putting the contract in the hands of witness and allowing him to say what it means. By so doing the referee abdicates his position of judge in favor of the witness.

VII. The evidence of the defendant shows that, in a conversation with Collyer, Collins told him he had agreed to build a vessel like the Pauline, etc.; this whole conversation clearly shows what the parties to the contract supposed it to mean.

VIII. Lastly, the receipt, taken in connection with the fact that this suit was not commenced until nearly six years after the building of the vessel, and also with the fact that armed men were kept on the vessel by plaintiff to prevent Collins from getting her before she was paid for, leads to the irresistible conclusion that when Collyer signed that last receipt he regarded it as a receipt in full of all demands growing out of the contract for the building of the vessel.

Dennis McMahon, for the respondent.—I. The present appellants are not in a condition to avail themselves of any error in the report of the referee, because—1. They have only interposed a general exception to his report. They have not made the same specific. 2. The time to except has gone by, and that time being fixed by statute, they cannot now amend their general exception. 3. The appellants should also have procured a case to be settled in which should be set forth the specific findings of fact and of law by the referee. (Hunt *a.* Bloomer, 13 *N. Y.* (3 *Kern.*), 341; Johnson *a.* Whitlock, *Ib.*, 344.)

II. The referee was right in his construction of the contract, aided as he was by the testimony of different witnesses, for the reasons stated in his opinion.

III. What does the contract mean? Under it all that the plaintiff undertook to do, excepting where otherwise specified,

was what came under the denomination of the ship-carpenters' work in the building, furnishing and launching the schooner in question, and in executing that ship-carpenter work in labor and materials he was to do it in a manner equal to and in nowise inferior to the schooner Pauline. He also contracted to fasten the vessel with galvanized iron above light-water mark, and to do some other things of no very great amount.

IV. The referee ruled correctly on the different objections made to the evidence on the subject of the construction of the contract. If the matter were at all ambiguous from the testimony as to what was embraced under the terms used in the contract as to "ship carpenters' work, &c.," it was the province of the referee to have evidence before him from experts, as to what was included by usage of the trade within the terms used in the contract. The authorities have always permitted that class of proof to be introduced.

V. The referee was right in holding that the extras had been ordered by the defendants. The evidence on this subject is conclusive.

VI. The referee was right in his ruling on the effect of the judgment in New Jersey, put in evidence by the appellants. 1. On the summing up, all the effect that the appellants claimed herein, as arising out of the recovery of the judgment, was, that it was a proper set-off to the amount claimed. It was allowed as a set-off. No claim was made that it was a bar to the plaintiff when offered in evidence. No such claim was set up; nor was any specific exception made to the referee's ruling on that subject. It could not have been set up as a bar here, as no such defence was pleaded in the answer, and it is necessary to plead the same in order to make it a bar. (Picquet *a.* McKay, 2 *Blackf.*, 465; Sawyer *a.* Hoyt, 2 *Tyler*, 288; Lansing *a.* Montgomery, 2 *Johns.*, 382; Howard *a.* Mitchell, 14 *Mass.*, 241; and see Jackson *a.* Wood, 3 *Wend.*, 27.) If an estoppel is not so pleaded, it will be considered as waived. (Brinsmaid *a.* Mayo, 9 *Vermt.*, 31.)

VII. To make a record in a former suit conclusive on any point, it should appear from the record that such a point was in issue; other evidence cannot be received to show that a particular matter, not in issue on the record, came in question, or was taken into consideration by the jury. (Manny *a.* Harris,

2 *Johns.*, 24.) Nor is the judgment and verdict evidence, unless it be on the same point and against the same parties. (Maybee *a.* Avery, 18 *Johns.*, 352; Davis *a.* Talcott, 14 *Barb.*, 611.) And where a judgment is introduced in evidence, but not under a plea of estoppel, the party proving it waives its conclusive character. (*Smith's Lead. C.*, 433, 444, 445.) 1. This judgment was an adjudication that the present defendants were entitled to a deduction from the plaintiffs claim of its amount; in other words, the defendants having accepted and proceeded to use the vessel in question, are bound to pay the contract price and the value of the extra work, less what it would cost to put it in perfect order under the agreement. It does not profess to adjudge as to what was extra or not. 2. The plaintiff here is not barred from recovering this extra bill, because he should have set it up there in that suit in New Jersey. The legal presumption is, that the common law of a sister state is similar to that of our own. (Holmes *a.* Broughton, 10 *Wend.*, 75.) The present plaintiff, having had no opportunity for setting up his present claim, cannot be barred by the finding of the jury in New Jersey on what was not before it either in fact or in law. (1 *Starkie's Ev.*, 214, 215; 1 *Greenl.*, § 524.)

VIII. The referee was right in his finding against the defence, of payment set up by the appellants, which was, that the matter was accorded and satisfied by the receipt and settlement in July, 1854. This defence should have been made out by the defence clearly. To sustain it, they introduce a receipt, which merely proves a payment of the final instalment under the contract, and $102.34 extra work. But a careful reading of the receipt, shows that Collyer carefully avoided saying "in full of extra work," but merely said "102.34, extra work," meaning a bill already rendered for extra work; not meaning thereby to be in full of such extra work as the bills for were not yet made out.

By the Court.—Sutherland, P. J.—I think the referee erred in excluding the evidence offered by the defendants to show the pendency, when this action was commenced, of the action in this court by them on the New Jersey judgment against the defendant; and that in that action the defendant

(the plaintiff in this action) had set up as a counter-claim the identical claim for which he brought this action.

It was not pretended or suggested that such prior action on the New Jersey judgment had been discontinued. And it appears from the referee's opinion, that he excluded such evidence solely on the ground that the matters so offered to be proved, though insisted on as a defence to this action by the defendants in their answer, if proved, would not be a bar or defence to this action.

To sustain his opinion on this point, the referee cites Fuller *a.* Read (15 *How. Pr.*, 236), and Wiltsie *a.* Northam (3 *Bosw.*, 162–168). It is plain that these cases do not apply, and do not sustain the referee's ruling on this point. They merely hold that there is no rule of law which prevents a person from setting up as a defence or counter-claim, a claim that he has before sued on. Concede this, and it does not follow that a person may bring an action on a claim which he has already set up as a counter-claim. Judge Woodruff, in one of the cases referred to by the referee (Wiltsie *a.* Northam, 3 *Bosw.*, 162), refers to the evident distinction between the two cases or questions. He says: "and it may be, that the court would not permit a defendant, after having set up such a counter-claim as a defence, and pending the litigation, to bring a new suit himself, to recover for the same cause of action."

If A brings an action on a claim against B, and A is afterwards made a defendant by B, in an action in which A can set up his claim as a counter-claim, I cannot see the least reason why he should not have the right to do so; why he should not avail himself of the opportunity offered to him by B, to recover his claim in the second action, if tried first.

The maxim, that no person shall be twice vexed for the same cause, certainly has no application in such case. But the substance and spirit of that maxim is, that no one shall be *unnecessarily* sued or vexed; and I think it forbids A from bringing an action against B, on a claim which he has set up as a counter-claim in an action by B against him, and in which action he can recover or be allowed his claim. Whether A would be obliged to set up his claim as a counter-claim, or be barred, &c., is another question; but if he actually sets it up, I think he should be held to be barred from bringing an action against

B on the claim, during the pendency of the action in which he has set it up.

In McAllister *a.* Reab (4 *Wend.*, 483, 493), Justice Marcy says: "A second litigation on the matter should not be tolerated, where a fair opportunity can be afforded by the first, to do final and complete justice between the parties."

I think, too, that the referee should have held, that the New Jersey judgment estopped the plaintiff from bringing this action.

The record of that judgment shows, I think, that the trial of the action in which the judgment was recovered, involved the construction of the contract between the parties for the building of the vessel, and I do not see how the plaintiffs in that action (the defendants in this) could have recovered the judgment unless the New Jersey court held that the construction of the contract, claimed by the defendants in this action, was correct. The theory of the complaint in that action was, that Collyer by the contract was bound to furnish all the materials, and build, furnish, and launch the centre-board schooner in a workmanlike manner, equal to and in no way inferior to the "schooner Pauline."

The defendant in that action (the plaintiff in this) pleaded the general issue, that is, that he did not undertake and promise, in manner and form, etc. There was a verdict in that action of $1,500 and costs, for the plaintiffs, upon which the judgment was entered.

The theory of the plaintiff's complaint in this action is, that by the contract he was bound to do only the ship-carpenter's work; to furnish the materials for and do only the ship-carpenter's work in a workmanlike manner, etc.

The work and materials which the plaintiff claims, in this action, to have been extra, outside of the contract, appear to have been done and furnished before the vessel was delivered to and accepted by the defendants.

If the defendants' construction of the contract is the true construction, it appears to me, that the plaintiff's claim for extra work and materials must fail, independent of the New Jersey judgment, and so it seems the referee thought. Now, as it must be presumed, from the New Jersey record, that the court, in the New Jersey action, must have passed upon this question

of the construction of the contract adversely to the plaintiff in this action (the defendant in that), I think the referee should have held the record a bar to this action.

Besides, it was shown by parol evidence on the trial of this action, that evidence bearing on the construction of the contract was given on the trial of the New Jersey action, and evidence tending to show that it was for Collyer, under it, to furnish certain items of work and materials.

It is true Collyer did not set off, in the New Jersey action, his claim for extra work and materials which he claims to recover for in this, probably because he never thought of making such a claim until that trial. It does not appear from the case, that he ever claimed to have done any work or furnished any extra materials before that trial, except such as he was paid for, specifying in his receipt for the money that it was for extra work.

It cannot be said to appear from the evidence in this case, that the defendants, or the defendant Collins, who superintended the building of the vessel, ever requested the plaintiff to do any work or furnish any materials as extra work or materials. The requests by Collins to do certain work or to furnish certain materials shown by the evidence, I think should be looked upon as notices merely, that he claimed that such work and materials were called for by the contract, to make the vessel like or as good as the Pauline.

The case does not show that when the plaintiff was notified by Collins, that he wanted certain materials, or materials of a certain kind, or quality, put in the vessel, or certain items of work done to her, that the plaintiff informed him that he claimed or considered such work or materials to be extra. The vessel having been delivered to the defendants and accepted by them, and they having had the benefit of all the work done by Collyer on her, and of all the materials furnished by him for her, if Collyer offered to show, on the New Jersey trial, that he had furnished materials or done work not required by the contract as construed by the court on that trial, we must presume, I think, that the evidence was received not as evidence of a set-off, but in diminution of the damages claimed by plaintiffs in that action.

Perhaps the defendants did not distinctly set up in their an-

swer in this action the New Jersey judgment as an estoppel, or bar, to this action; but the record of that judgment was put in evidence, and was properly received in evidence, at least as evidence of a counter-claim; and the defendants having insisted upon it, also, as an estoppel, or bar, if the referee had held it to be a bar, I think he might and ought to have permitted the defendants to amend their answer. I think we may consider the answer amended.

The defendants' exception at the end of the case authorizes them, I think, to raise the question of estoppel here.

I deem it unnecessary for us to pass upon the question, whether the referee's construction of the contract was right, either of the grounds before stated being sufficient, in my opinion, for reversing the judgment.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

Leonard, J.—I am satisfied that there should be a new trial in this case for errors committed on the trial and in the findings.

1. It was error to read the contract to a witness and inquire whether certain kinds of carpenters' work were included in it, according to the usage of the trade. This is the inquiry substantially put to one of the plaintiff's witnesses, and it appears to have been answered by the witness according to his judgment of the true construction of the contract by the usage of the trade.

The meaning of terms used in a contract may be ascertained by usage. When the meaning has been so ascertained, it is the province of the court to determine the construction and meaning of the contract, and to decide, in this case, whether the work and materials for which the plaintiff seeks to recover, were extra, or included therein. The witness cannot be allowed so to interpret the whole contract.

2. There is no ground for permitting a recovery for any thing as extra, except where the work or materials so claimed were ordered or directed by the defendant, or where he is shown to have known that the work or materials were extra, and did not object, or where he has acquiesced in or ratified it. It is not enough, in this case, that the defendants accepted and used the

vessel after the work of the plaintiff was completed, for there is no evidence that the defendants had any knowledge that there was any extra work or materials, except a small amount, $102, for which they had paid.

The proof, on the part of the plaintiff, is insufficient to sustain the finding of the referee in this respect. Of course it cannot be doubted that extra work may have been done, and materials furnished, by the plaintiff upon the schooner, and in that event, if it was upon the request of the defendants, express or implied, the plaintiff is entitled to recover. Whether there was extra work and materials performed and furnished, depends upon what and how much is included in the term "all the parts belonging to the ship-carpenter's work," mentioned in the contract. The referee appears to have correctly apprehended it.

3. The counsel for the plaintiff insists that the exception to the findings of the referee is general, when it should be specific. There is but one fact found, viz., that the defendants are indebted.

The exception is as specific as the finding. As the case has been heard on the merits, I am disposed to hold it for decision. I think, under the decisions, the case might be sent back for amendment so as to have findings of fact specifically stated in the case and also the exceptions. But we have looked into the merits and there will be no injustice done by rendering our decision without the amendment.

4. The questions arising in respect to the effect of the judgment in New Jersey, and the pendency of another action in this State, wherein the plaintiff has interposed his present cause of action as a counter-claim, have been very fully considered by the learned justice who presided on the argument of this case at the general term, but, with great respect, I must dissent from some of his conclusions.

1. The judgment in New Jersey is not *res adjudicata* on the present question. That action was to recover damages for a breach of the contract for the construction of the schooner. At common law, the value of extra work and materials, outside of the contract, could not be pleaded in such an action by way of recoupment or set-off. It is, by virtue of the statute law prevailing in the State of New York, that counter-claims on any cause of action arising on contract may be interposed in any

action arising also on contract. We cannot assume that such a statute prevails in New Jersey. In the action in New Jersey no set-off was claimed or pleaded. Mr. Collyer pleaded to that action that he did not undertake and promise in the manner and form, etc., technically called the general issue; merely putting in issue the allegations of the declaration, viz., the making and breach of the contract. Under that issue, no evidence of extra work performed or materials furnished in performing the contract, was admissible. It would have been excluded if offered. The furnishing of extra work and materials did not tend to show that Mr. Collyer had not broken the contract set forth in the declaration.

If the defence was connected with the subject of the action the rule would be different. (Davis *a.* Tallcot, 12 *N. Y.* (2 *Kern.*), 184.) Where the defence to a former action consists in proving the same facts which constitute the foundation for recovery in the second action, there a recovery in the former is a bar to the second action. A former judgment is a bar only to such claims or matters as might have been litigated under the pleadings and issues as made in the action, not to all claims that might have been put at issue or litigated. (Burdick *a.* Post, 12 *Barb.*, 168.) But, in a case where the defendant might set up his counter-claim or set-off, in answer to the plaintiff's demand, he has his election whether he will do so or bring his cross action. Judge Bronson declares that to be the rule. (Batterman *a.* Pierce, 3 *Hill*, 171. See also the opinion of Judge Selden in Gillespie *a.* Torrance, 25 *N. Y.*, 306, particularly page 310.)

2. In respect to the question arising from the counter-claim or set-off interposed by Mr. Collyer in the action brought in this State upon the judgment recovered against him in New Jersey, the authorities are also adverse to the views expressed by the presiding justice in this case.

In such case the party must be put to his election between the action which he has brought, and his counter-claim in the action brought against him. (Fabricotte *a.* Launitz, 3 *Sandf.*, 743; Halsey *a.* Carter, 1 *Duer*, 667; Legnot *a.* Redding, 4 *E. D. Smith*, 285.) Opinion by Judge Ingraham. (*Vide*, also, Cordier *a.* Cordier, 26 *How. Pr.*, 187, and Barth *a.* Burt, see *Ante*, 349.)

The rule that would require the plaintiff to desist or be barred from prosecuting this action, if correct, would also entitle him to demand that the counter-claim for the judgment recovered in New Jersey by the defendants, should be barred in this action by reason of their former action prosecuted on that judgment, and now pending in this State, as the answer in this case alleges.

3. Under the system of pleading prevailing in this State, it is not necessary to state what conclusion or judgment will be demanded on the facts pleaded. The court are to render such judgment as the facts legally admitted in evidence will justify or require. The defendants were at liberty to insist that the judgment rendered in New Jersey is a bar to this action, although no statement to that effect is made in the answer. The judgment was admissible in evidence, and might be claimed to constitute a set-off or a bar at the pleasure of the defendants, although it cannot, in the present case, prevail as a bar or an estoppel.

I agree that the judgment be reversed and a new trial had before the same referee, with costs to abide the event, for the errors occurring at the trial, and for the defect of proof indicated.

Barnard, J.—I concur in the conclusion.

DIGEST

OF

ALL POINTS OF PRACTICE

EMBRACED IN

THE STANDARD NEW YORK REPORTS,

Issued during the period covered by this Volume:

Viz.—39 and 40 BARBOUR; 8 BOSWORTH; 17 ABBOTTS' PR. R., and 26 HOWARD'S PR. R.

ABATEMENT.

1. The conviction, and sentence to the state prison, of a party defendant, pending the action against him, do not abate the action. (*Per* BOSWORTH, Ch. J.) *N. Y. Superior Ct.*, 1861, Davis *a.* Duffie, 8 *Bosw.*, 617.
2. On the expiration of a year from the death of a party to the action, the court has no power, on motion, to allow a continuance of the action by or against his representatives. *Supreme Ct.*, 1863, Matter of Borsdorff, *Ante*, 168.
3. Upon the death of a plaintiff, after final judgment in his favor, his personal representatives may bring an action upon the judgment, to obtain the same relief as was formerly obtained in such cases by a writ of *scire facias.* *N. Y. Superior Ct.*, 1861, Ireland *a.* Litchfield, 8 *Bosw.*, 634.
4. The personal representatives cannot issue execution by leave of court; nor can they revive the judgment by a motion under section 121 of the Code. (*Per* BOSWORTH, Ch. J.) *Ib.*

JUDGMENT; SUPPLEMENTAL COMPLAINT.

ACCOUNT.

BILL OF PARTICULARS.

ACCOUNTING.

Principles of accounting between mortgagor and mortgagee in possession on a judgment for redemption of the mortgaged premises. *N. Y. Superior Ct., Sp. T.*, 1860, Fogal *a.* Pirro, *Ante*, 113.

ACTIONS.

1. The statute (1 *Rev. Stat.*, 750, § 9)—allowing a joint tenant or tenant in common to maintain an action of account or for money had and received against his co-tenant,—does not apply where one tenant possesses the entire premises without any agreement or demand on the part of the others, and farms it at his own cost, taking the produce [9 Eng. L. and Eq., 337; 12 Mass., 149; 18 Barb., 265]. *Supreme Ct., VII. Dist.*, 1863, Dresser *a.* Dresser, 40 *Barb.*, 301.
2. An action will not lie against a municipal corporation, to try irregularities in proceedings to take land for public use, and awarding the damages to another than the true owner. The proper remedy stated. *Supreme Ct.*, 1863, Cahill *a.* Palmer, *Ante*, 196.
3. The Corporation of the city of New York in 1692 granted land, bounded on the East river, with the usual covenants, and with a provision that the grantee should make and maintain a wharf, along low water mark, to be a public street, and with a further covenant that if he performed this condition, he and his heirs and assigns should have and enjoy all the profits, &c., of the wharf. The Corporation having subsequently become the owner of, and having leased the land in front of their grantee's wharf, to a third person, giving him permission to fill in the same and enjoy the wharfage upon the new front thus made, which he accordingly did;—*Held*, that the claim for damages which vested in the grantee by the destruction of his wharf, was a mere chose in action, and on his death passed to his personal representatives, not to his heirs and devisees; and that any recovery thereon would be for the entire damages for the whole injury, and successive actions could not be brought, as in the case of continuing trespasses. *N. Y. Superior Ct.*, 1861, Van Zandt *a.* Mayor, &c., of New York, 8 *Bosw.*, 375.
4. A vote of the common council of a municipal corporation that they will grant a petition for a conveyance of land, upon condition that the proposed grantee should release certain claims, followed by his giving notice to them of his willingness to do so; if it be assumed to amount to a contract binding on the corporation, will not, in case of a breach, sustain an action for damages by the heirs of the proposed grantee; nor will a court of equity, after the lapse of seventy years, compel specific performance. *Ib.*

5. To sustain either remedy, there must be proof of a tender of the release. *Ib.*

6. An action cannot be maintained against the individual members of a joint stock company, composed of more than seven associates, organized under the Laws of 1849, ch. 258, as amended by the Laws of 1853, ch. 153, to recover a debt of the association, until after the recovery of judgment against the company and the return of execution unsatisfied. *N. Y. Superior Ct.*, 1863, Robbins *a.* Wells, 26 *How. Pr.*, 15.

7. A stockholder of a corporation holding a claim against it for which the stockholders are individually liable, cannot recover upon it in an action against one of the stockholders individually. He can only set up the claim in a proper action against the stockholders generally for a contribution. *N. Y. Superior Ct.*, 1861, Beers *a.* Waterbury, 8 *Bosw.*, 396.

8. In those cases where one pretending to be an agent, has contracted as such, without authority from the principal, the party contracted with may, on learning the facts, repudiate the contract, and hold the assumed agent immediately responsible for damages, without waiting for the time when an action might be maintained on the contract itself; and the damages must be measured, not by the contract, but by the injury resulting from the agent's want of power. Whenever a person enters into a contract as agent for another, he warrants his own authority, unless very special circumstances, or express agreement, relieve him from that responsibility. [10 M. & W. 9, 10; 3 B. & Ad., 114; 13 Ad. & Ellis, N. S., 744; 10 Cush., 395; 5 Seld. 585; Story on Agency, § 264.] An action upon such warranty must always be appropriate where personal liability attaches to an agent in consequence of his contracting without authority. In such action the plaintiff would be relieved from the necessity of showing performance of conditions precedent, and from the delay which the terms of the contract might require, if the remedy were limited to an action on the contract; and if special damages should be incurred in consequence of the agent's failure to bind his principal, such as the costs of an unsuccessful action against the principal to enforce the contract, they may be recovered. If the act of the agent were fraudulent, an action for the deceit would lie, but it would be a concurrent remedy with an action on the warranty. *Ct. of Appeals*, 1863, White *a.* Madison, 26 *How. Pr.*, 181.

9. Whether the party contracted with can maintain an action against the agent, *on the contract, Query?* *Ib.*

10. An action cannot be maintained against the purchaser at a fore-

closure sale, on the memorandum subscribed by him at the foot of the conditions of sale, stating that he had purchased at a certain price, and that he agreed to comply with the conditions. If it is to be called a contract at all, it is a contract with the court. The sale is made by the order of the court, and is under its control, and not that of any party, to perform or to rescind. In truth, however, the word contract is somewhat inartificially used when it is applied, as it has been, by judges to such papers. The memorandum is only a quasi contract; it is in reality a submission to the jurisdiction of the court in the foreclosure suit as a purchaser under the judgment. It is easy to see that it lacks the most essential elements of a contract, not only parties, but mutuality and consideration. It contains, or was intended to contain, an express consent to the exercise of the powers which courts of equity assert *ex proprio vigore* over purchasers, and it is doubtful if it adds any thing to the jurisdiction or authority of the court in this particular. There can be no suit maintained upon it as an express stipulation with any person whatever. *Supreme Ct., II. Dist.*, 1862, Miller *a.* Collyer, cited in Willets *a.* Van Alst, 26 *How. Pr.*, 325.

11. A *cestui que trust*, after having assented to a sale made by the trustee, by accepting his share of the proceeds, cannot maintain ejectment to recover possession of his share of the land, on the ground that the sale was void. *Supreme Ct., II. Dist.*, 1863, Johnson *a.* Bennett, 39 *Barb.*, 237.

12. The maker of a promissory note has the whole of the last day of grace in which to pay it. And an action commenced against the maker on the last day of grace, though the note was payable at a bank and the suit was commenced after banking hours,—*Held*, prematurely brought, and the plaintiff should be nonsuited [3 Wend., 170]. *Supreme Ct., VII. Dist.*, 1863, Smith *a.* Aylesworth, 40 *Barb.*, 104.

13. Where a claimant on a policy, having presented proofs that were clearly defective, and were objected to by the insurers, subsequently served perfect proofs, notifying the insurers that they were intended as of the time of the delivery of the former proofs, and merely to obviate any technical objections,—*Held*, that an action brought at a due period after the service of the defective proofs, but immediately after the delivery of the second proofs, was prematurely brought. *N. Y. Superior Ct.*, 1861, Kimball *a.* The Hamilton Fire Insurance Company, 8 *Bosw.* 495.

Cause of Action; Executors and Administrators, 33, 34.

ADMEASUREMENT OF DOWER.

1. With the consent of the widow, rooms in a building can be assigned to her for dower, but not, *it seems*, without her consent. *Supreme Ct., I. Dist.*, 1863, Stewart *a.* Smith, 39 *Barb.*, 167.
2. It is not a compliance with the provision of 3 Revised Statutes, 791, § 2—requiring notice of proceedings for the admeasurement of dower to be given to the owners of the land, claiming a freehold estate therein—merely to give notice to the tenant or person in possession. [12 Wend., 137.] *Ib.*

AFFIDAVIT.

1. An insolvent debtor who has been convicted of a felony, unless pardoned, is disqualified from making the affidavit required as the foundation of the various proceedings in favor of insolvents, and a discharge granted to such insolvent is void. *Supreme Ct., II. Dist.*, 1863, The People *on rel.* Lord *a.* Robertson, 26 *How. Pr.*, 90.
2. An affidavit bearing the signature of the adverse party, is properly received to prove admissions, without proof of the authority of the magistrate who administered the oath. *Supreme Ct.*, 1863, Morrell *a.* Cawley, *Ante*, 76.

ARREST.

ALIMONY.

1. Where the wife obtained a judgment against her husband, for a separation from bed and board forever, and in which judgment the court made an allowance to her of a sum in gross, and declared that it should be in full satisfaction for her support and of all alimony whatsoever, such judgment is a bar to any claim for alimony by the wife, in a subsequent action for divorce brought by her husband against her, for adultery, although she claims affirmative relief in her defence, charging her husband with adultery. Alimony, whether in an action for a divorce or for a separation, cannot be claimed as a *right*. It is wholly discretionary with the court [2 Barb., 146]. Where the parties have agreed to live apart, and provision has been made by the husband for the support of the wife—whether adequate or not is immaterial—the wife has no longer any claim upon her husband; and her position is no better where a separation has been adjudged with a provision for her support. *N. Y. Superior Ct., Sp. T.*, 1863, McDonough *a.* McDonough, 26 *How. Pr.*, 193.
2. But such judgment does not preclude her from obtaining a counsel fee to assist her in defending the suit for divorce. *Ib.*

3. On denying her motion for alimony in such a case, the court directed that she might, upon restitution of the original sum allowed her in gross, renew her motion for temporary alimony, and also for a further counsel fee. *Ib.*
4. In fixing the allowance of alimony after a judgment of divorce, the ability of the defendant is a primary inquiry, and the sum allowed must be so clearly within his ability, that his own means of living will not be unreasonably reduced. His ability being ascertained, then the inquiry what is suitable for the plaintiff may be considered, without any restriction arising from fear of injustice to the defendant. And if it be necessary, in determining the husband's ability, his occupation and his income therefrom may properly be taken into account. *N. Y. Superior Ct.*, 1861, Forrest *a.* Forrest, 8 *Bosw.*, 640.
5. One third of the husband's income cannot be deemed, in itself, an extravagant proportion to award to the plaintiff. *Ib.*
6. The decision of this court in this case (3 Bosw., 661), that upon the question of alimony, evidence of the conduct, reputation, associations, or habits of the plaintiff since the divorce was pronounced is inadmissible, re-affirmed. *Ib.*
7. Voluntary dispositions made by the defendant of his property, or any part of it, pending the litigation, ought not, in any degree, to prejudice the plaintiff, or reduce the amount of her allowance, especially if, notwithstanding such dispositions, he is still able to pay it. *Ib.*
8. Where the estate of the husband was shown to be between $200,000 and $300,000, and his annual professional income exceeded $12,000, —*Held*, that an allowance of $4,000 per annum, was not unreasonable. *Ib.*
9. The allowance of such permanent alimony may, in the discretion of the court, be directed to be computed from the time of the commencement of the action; and this is especially proper where the litigation has been protracted many years, by the fault of the defendant, and to the embarrassment of the plaintiff. *Ib.*

AMENDMENT.

1. Irregularities and omissions may be amended by leave of the court, in the cases enumerated in 2 Revised Statutes, 424, 425, § 7, where an amendment is not against the right and justice of the matter in suit. *N. Y. Superior Ct., Chambers*, 1860, Macomber *a.* Mayor, &c., of New York, *Ante.*
2. Leave to plead or answer after default should not be granted, unless the party has a good defence on the merits, and the omission to plead or answer was the result of accident or mistake, without culpable neg-

ligence. *N. Y. Superior Ct., Chambers*, 1860, Macomber *a.* Mayor, &c., of New York, *Ante*, 35.

3. The statute of jeofails was first made applicable to judgments by default (4 and 5 Anne, ch. 16, § 2), and a marked distinction exists between judgments after trial and judgments by default,—unfavorable to amendments in the latter, whether the defect is suggested by the plaintiff or defendant. *Ib.*

4. Where the plaintiff supposed, in ignorance of the true name of the defendants, that they were a corporation, and therefore sued them by the name in which they transacted their business; and having afterwards ascertained that the name used was not a corporate name, but that used by three persons who were the real defendants, the plaintiff asked leave to substitute their names as defendants, with proper allegations in the complaint,—*Held*, that section 175 of the Code met the case, and the motion should be granted without costs. *Supreme Ct., I. Dist., Sp. T.*, 1858, Newton *a.* Millville Manufacturing Company, *Ante*, 318, *note.*

5. Where after an appeal has been taken from a judgment, a case is made and settled, and the parties appear to argue the appeal upon the case, no objection for irregularity being taken, leave will be given to enter *nunc pro tunc* an order refusing a new trial. *N. Y. Com. Pl.*, 1864, Gurney *a.* Sharp, *Ante*, 410.

6. The court may allow a stamp to be affixed to an original process, in a case where the failure to affix such stamp is excusable, and thereupon such process will be valid as if originally duly stamped. *Chautauque County Ct.*, 1863, Jackson *a.* Allen, 26 *How. Pr.*, 119.

APPEAL, 16; REFERENCE, 9.

ANSWER.

1. Section 74 of the Code of Procedure,—which provides that the objection that an action was not commenced within the time limited can only be taken by answer,—is applicable to actions for limited divorce. *Supreme Ct.*, 1863, Bihin *a.* Bihin, *Ante*, 19.

2. Thus, where the complaint in such an action averred acts of cruelty, committed more than ten years prior to the commencement of the action, with particulars of time, and the defence of the Statute of Limitations was not interposed in the answer,—*Held*, that evidence of such cruelty was admissible. *Ib.*

3. In pleading the Statute of Limitations in an action brought to obtain redemption of mortgaged premises, the essential features of the defence are, possession for over ten years without any payment on account of the mortgage, or any acknowledgment of the relation of

mortgagor and mortgagee, or any payment of rents and profits, or accounting for them. *N. Y. Superior Ct., Sp. T.*, 1860, Fogal *a.* Pirro, *Ante*, 113.

4. But, an answer averring a possession in the defendant and those under whom he claims for twenty years, adverse and hostile to the plaintiffs, and under a title vested in him, the defendant, or those through whom he is entitled, is sufficient. *Ib.*

5. In an action for false imprisonment, under the Code, a justification that there were reasonable grounds to believe that plaintiff was guilty of a criminal offence, must be pleaded specially; and the answer must first show the actual commission of the offence, and then the cause to suspect the plaintiff in its commission. If as much as this is not pleaded, or if the evidence comes short of this, it can only go to the question of damages. *Supreme Ct., II. Dist.*, 1863, Brown *a.* Chadsey, 39 *Barb.*, 253.

6. An answer, alleging that a judgment relied on by the plaintiff was obtained by fraud and collusion between parties named, is sufficiently definite and certain, without specifying the acts which show fraud and collusion. *Supreme Ct., I. Dist.*, 1864, Culver *a.* Hollister, *Ante*, 405.

7. In an action by the receiver of a banking incorporation against the indorser of a note, an answer alleging that the bank of which plaintiff is receiver discounted the note on which he sues, upon a corrupt agreement, against the form of the Statute, that the defendant should receive $300 (the amount of the note being $500, and it being payable three months from its date), and leave the remaining $200 in the bank until the note became due, then to be applied towards its payment, sufficiently states the defence of usury. The allegation that the note was discounted (when unaccompanied by other averments), imports a discount at a legal rate of interest, for the time the note then had to run. If plaintiff desired more specific details, his remedy was by motion. *N. Y. Superior Ct.*, 1861, Butterworth *a.* Pecare, 8 *Bosw.*, 671.

8. In an action brought by husband and wife to recover possession of land, the plaintiffs claimed as owners in right of the wife. On the trial, the defendants offered in evidence an appointment made by the husband and wife, which recited an ante-nuptial agreement between them and S., to the effect, that notwithstanding the intended marriage, the real and personal property of the wife should remain her separate estate; reserving power to the husband and wife to discharge the said S., or substitute other persons in his place, which appointment thereupon declared said S. discharged, and substituted A. in his place. The defendants also offered, with this appointment, a written accep-

tance signed by A., in which he described himself as trustee for the property and effects of the wife; but these instruments did not otherwise describe either of these persons as trustees, nor recite any conveyance to, or title in them; and the defendants offered no other evidence on these points. *Held*, that this evidence was properly excluded. In order to raise the objection that the plaintiffs had not capacity to sue, it must be taken in the answer, and could not be raised for the first time on the trial. This evidence, moreover, did not show that the legal title was not in the plaintiffs. *N. Y. Superior Ct.*, 1861, Van Amringe *a.* Barnett, 8 *Bosw.*, 357.

9. Whether the action is brought in the name of the trustee, or the *cestui que trust*, is a matter not affecting the substantial rights of the defendant. *Ib.*

10. In an action by a trustee, an answer setting up facts showing that the purposes of his trust have been accomplished, amounts to a denial of his title, and is sufficient. *N. Y. Superior Ct.*, 1864, Peck *a.* Brown, 26 *How. Pr.*, 375.

11. Where the complaint on a bill or note alleges that the defendants were partners, and as such made it; an answer simply denying that they made it, admits the partnership. *N. Y. Superior Ct.*, 1861, Fairchild *a.* Rushmore, 8 *Bosw.*, 698.

12. Such answer may be struck out as sham, on proof that one of the defendants made the note in the firm name. *Ib.*

13. It is not an answer to such motion, to show that the note was made after the dissolution of the firm, if the plaintiffs show a previous course of dealing between them and the firm, and the defendants do not show that plaintiffs had any notice of the dissolution. *Ib.*

14. An answer averring that plaintiff is not, but that A. B. is, the real party in interest in the action, is not frivolous. *Superior Ct., Chambers*, 1863, Tamisier *a.* Cassard, *Ante*, 187.

15. That an answer, though verified and confined to a denial of the allegations of the complaint, may be struck out as sham. *N. Y. Superior Ct.*, 1861, Clafflin *a.* Griffin, 8 *Bosw.*, 689.

PLEADING; DEFENCES; EVIDENCE, 72.

APPEAL.

1. The receipt of the amount of a judgment, voluntarily paid, does not affect the right of the party receiving the payment to appeal from the judgment simply to obtain a judgment for more. The principle upon which a party enforcing a judgment is not allowed also to appeal from it, rests upon the injustice of enforcing or claiming that, the only

right to which is derived from the judgment of a court, and repudiating that which is made the consideration therefor by the same adjudication, considered as an entirety. *N. Y. Superior Ct.*, 1864, Benkard *a.* Babcock, *Ante*, 420.

2. In an action in which the plaintiff recovered judgment for the purchase-money of certain real property which was subject to the lien of unpaid taxes, &c., the judgment directed the plaintiff to apply the money recovered to the payment of such taxes, &c.; and further declared that if the defendant should first pay them, he should be credited therewith as so much paid on the purchase-money.

   Held, that this provision was not a benefit secured to the defendant by the judgment, in such sense that he, having paid the taxes, would be precluded from appealing from the judgment. *N. Y. Superior Ct.*, 1864, Kelly *a.* Bloom, *Ante*, 229.

3. It might be otherwise, if the judgment had not directed the plaintiff to pay the taxes out of the purchase-money recovered by him. *Ib.*

4. A party cannot claim the benefit of a judgment, and at the same time appeal from it *Ib.*

5. The refusal of the court to allow a party to serve a bill of particulars after his time to do so has expired, is not reviewable on appeal. *N. Y. Com. Pl.*, 1863, Goings *a.* Patten, *Ante*, 339.

6. Where a motion is made to vacate an order, obtained *ex parte*, for irregularity in respect to the want of notice, and, on hearing the parties, the court declines to vacate the order, the defect, if any, is cured, and an appeal from the second order is not well taken. [SUTHERLAND, J., dissenting.] *Supreme Ct., I. Dist.*, 1864, Culver *a.* Hollister, *Ante*, 405.

7. An order of court requiring a plaintiff acting in a representative capacity to give security for costs, under section 317 of the Code, is not appealable, except for irregularity in granting or procuring it. *Supreme Ct., I. Dist.*, 1864, Bolles *a.* Duff, *Ante*, 448.

8. An order for the discovery of books and papers, under the Revised Statutes, is appealable. *Supreme Ct., I. Dist.*, 1863, Julio *a.* Ingalls, *Ante*, 448, *note.*

9. An order of the City Court of Brooklyn denying a motion for a new trial is reviewable on appeal. *Supreme Ct.*, 1864, Suydam *a.* The Grand-street and Newtown Railroad Company, *Ante*, 304.

10. An appeal lies upon the law, from a judgment, where there has been a trial before the judge and a jury, at circuit. The appeal is considered, however, only upon the exceptions taken. *Supreme Ct.*, 1863, Lobach *a.* Hotchkiss, *Ante*, 88.

11. Where the trial has been by the court or referees, an appeal can be

taken to the general term directly, so as to obtain a review of both the facts and the law. *Ib.*

12. Unless notice of appeal is actually received by the clerk of the court within the time limited by the Code, the right to appeal is lost. *Supreme Ct.*, 1863, Morris *a.* Morange, *Ante*, 86.

13. The undertakings prescribed by the Code, sections 335, 338, must be served with the notice of appeal, in order to stay the respondent's proceedings. *N. Y. Superior Ct.*, 1863, Niles *a.* Battershall, 26 *How. Pr.*, 93.

14. No undertaking is necessary on appeal from the special to the general term. *N. Y. Superior Ct., Sp. T.*, 1863, Niles *a.* Battershall, 26 *How. Pr.*, 93.

15. An appeal to the general term, from a judgment at the special term, under section 348 of the Code may be taken without giving any undertaking. The undertaking is only necessary for the purpose of staying proceedings. *N. Y. Superior Ct.*, 1861, Davis *a.* Duffie, 8 *Bosw.*, 691.

16. On an appeal from an order requiring a pleading to be made more definite and certain, the proper method of suspending the operation of the order pending the appeal, is by a stay of proceedings, not by an extension of the time for an amendment. *Supreme Ct., I. Dist.*, 1864, Culver *a.* Hollister, *Ante*, 405.

17. The omission to give an undertaking or security upon an appeal from a special to the general term, is not sufficient ground for a motion to dismiss the appeal. *Supreme Ct., II. Dist.*, 1863, Kitching *a.* Diehl, 40 *Barb.*, 433.

18. An appeal without security is effectual, under section 348 of the Code; but it does not *per se* operate as a stay of proceedings on the judgment. [Explaining Kelsey *a.* Campbell, 38 Barb., 238.] *Ib.*

19. The objection, that a chattel mortgage executed in another State was void for illegally reserving the right to retain possession and to sell the goods as part of the mortgagor's stock in trade, cannot be raised on appeal from a judgment, if not taken at the trial. *N. Y. Superior Ct.*, 1861, Brown *a.* Platt, 8 *Bosw.*, 324.

20. An objection taken at the trial, that a complaint does not state facts sufficient to constitute a cause of action, is not available on an appeal from the judgment, where the defect is supplied by evidence at the trial; and especially is this so, when the defect is one which should be remedied by a motion to make the complaint more definite and certain. *N. Y. Superior Ct.*, 1861, Morton *a.* Pinckney, 8 *Bosw.*, 135.

21. The objection that a referee's report does not state the facts found and his conclusions of law separately, cannot be raised on an appeal

from the judgment entered on the report; but only by a motion at special term to correct the report. *N. Y. Superior Ct.*, 1861, Platt *a.* Thorn, 8 *Bosw.*, 574.

22. On an appeal in such case, the court will not interfere with the referee's rejection of part of the plaintiff's demand, and his allowance of a counter-claim made by the defendant, where these were apparently the result of his determination of facts, and are sustained by some evidence, and not against such weight of evidence as to justify setting aside the report on that ground. *Ib.*

23. If the court have power to compel one who takes an assignment of the cause of action, pending suit, to become a plaintiff, it is a matter of discretion, and a refusal to entertain the application is not reviewable on appeal. *Supreme Ct., I. Dist.*, 1864, Packard *a.* Wood, *Ante*, 318.

24. An order refusing to open a default taken for want of an answer is not appealable. *Supreme Ct., I. Dist.*, 1863, Millard *a.* Van Ranst, *Ante*, 319, note.

25. Where an action has been tried by jury, and no motion made at special term or circuit for a new trial, a review upon the facts cannot be had at general term. *Supreme Ct.*, 1863, Lobach *a.* Hotchkiss, *Ante*, 88.

26. Upon appeal from a judgment on the report of a referee, every intendment is to be made of which the evidence will admit, to sustain the report and supply the necessary facts to justify it. *N. Y. Superior Ct.*, 1861, Hoyt *a.* Hoyt, 8 *Bosw.*, 511.

27. Where, on an allegation that the defendants owned a vessel, and employed and hired the plaintiff to go on board of her as master on a designated voyage, and that under such employment he served as master on such voyage, and the report states that the defendants held the legal title but as security only, and had control of the voyage, and that the plaintiff went as master with their assent, and obeyed their orders, and was paid by them for his services, in part, as such master, and that there is "due to the said plaintiff by the defendants" the sum of $1,262.75, for which he "is entitled to recover judgment herein against said defendants," it will be intended on an appeal from the judgment, that the referee found that the plaintiff was hired by the defendants, although the report does not in terms so state, where, upon the evidence contained in the case, a finding to that effect would not be disturbed as unwarranted. *N. Y. Superior Ct.*, 1861, Richardson *a.* Dugan, 8 *Bosw.*, 207.

28. Where no exception is taken by the successful party to a finding of the court below upon a question of fact, nor any attempt made to review it in any mode known to the law, the finding must, for the pur-

poses of the hearing upon appeal, be taken as true, and the party will be precluded from insisting upon the contrary. *Supreme Ct., III. Dist.*, 1862, Fake *a.* Whipple, 39 *Barb.*, 339.

29. On appeal, the respondents are entitled to the benefit of any presumption which will uphold their judgment, in the absence of evidence, properly in the case, upon the point in question. *N. Y. Superior Ct.*, 1863, Lee Bank *a.* Satterlee, *Ante*, 6.

30. On appeal from a judgment in which the validity of a married woman's contract is involved, if it does not appear from the evidence, properly in the case, that she was the wife of the person with whom the contract was made, the appellate court will, in support of the judgment, presume that she was not his wife. *Ib.*

31. On appeal from an order proper to be granted only as a matter of favor, the court at a general term, in support of the order, will presume, till the contrary appear, that it was so granted. *Supreme Ct.*, 1863, Leighton *a.* Wood, *Ante*, 177.

32. Where a judgment is imperfectly proved, on the trial at the circuit, the party may produce, on the argument of an appeal, and leave with the court, a record of the judgment, properly authenticated to make it complete evidence. *Supreme Ct., V. Dist.*, 1863, Jarvis *a.* Sewell, 40 *Barb.*, 449.

33. Where the plaintiff in an action against a police officer for false imprisonment recovered nominal damages for arresting her on a charge of felony, the court on appeal refused to interfere with the judgment. Burns *a.* Erben, 26 *How. Pr.*, 273.

34. Where a referee has omitted to report upon all the issues, and the party injured has duly excepted to such omission, the general term will, on this ground, reverse the judgment and order a new trial *Supreme Ct., I. Dist., Sp. T.*, 1863., Brown *a.* N. Y. Central Railroad Co., 26 *How. Pr.*, 32.

35. Where, on a trial, by the court, without a jury, of an action brought to set aside a grant as fraudulent, declarations of the grantor subsequent to the grant are offered to impeach testimony of the grantor, and are admitted against objection and exception, and it appears by the opinion of the court accompanying its decision, and only by such opinion, that the court, on determining the facts, held and treated such declarations as competent testimony to establish a fraudulent intent in making the grant, and was influenced thereby; the court, on appeal from the judgment, will not hold the opinion such evidence of the existence of the error thereby declared, as to interfere with the judgment on that ground. (*Per* Robertson, J.; Bosworth, Ch. J., *contra.*) *N. Y. Superior Ct.*, 1860, Savage *a.* Murphy, 8 *Bosw.*, 75.

36. Such declarations of the grantor, under the facts and circumstances proved in this case, are competent evidence in chief, to impeach the grant. (HOFFMAN, J.) *Ib.*

37. The exclusion of evidence, irrelevant and immaterial as the case stood when it was offered, is not sufficient cause for reversing a judgment, even though it would have been pertinent to the case as subsequently developed, and its rejection, if offered subsequently, would have been erroneous. *N. Y. Superior Ct.*, 1861, Heroy *a.* Kerr, 8 *Bosw.*, 194.

38. The omission of the court to specify in its statement of the facts found, a decision of every material question of fact presented by the pleadings, will not justify a reversal of the judgment, where the case, on the appeal, fails to show affirmatively any erroneous decision of a matter of fact or matter of law. *Ib.*

39. Every intendment will be in favor of the accuracy of the decision of the court upon questions of fact within the issue, when there is nothing in the case opposed to the justice of such intendment. *Ib.*

40. To entitle an appellant to a reversal, on the ground that the finding of the referee, before whom the action was tried, is against the weight of evidence, it is not enough that he satisfies the appellate court that, upon the testimony as it appears in the printed case, assuming that the witnesses on his behalf are entitled to full credit, they would have come to a different conclusion from that of the referee. *N. Y. Superior Ct.*, 1861, Morris *a.* The Second-avenue Railroad Company, 8 *Bosw.*, 679.

41. His case must be very clear and substantially without contradiction; else the finding of the referee, like the verdict of a jury, will be held conclusive. *Ib.*

42. This rule applied in support of the finding of a referee in favor of the defendants, upon conflicting evidence on an issue of payment. *Ib.*

43. A judgment of divorce will not be reversed on appeal, and a new trial ordered, merely because the record contains some technical exceptions which were well taken, if the court is satisfied upon the whole case that justice has been done. *N. Y. Superior Ct.*, 1861, Forrest *a.* Forrest, 8 *Bosw.*, 640.

44. Errors on the part of a referee, to whom it was referred to ascertain the amount of alimony proper to be allowed, and to report the same with the proofs, do not necessarily require a reversal of the judgment for alimony entered at special term thereon, where the court at special term, in awarding such judgment, examined the whole subject, and properly exercised a judicial discretion thereon. *Id.*

45. The verdict must be entirely against the weight of evidence to justify an appellate tribunal in setting it aside; and where there is no such preponderance in the weight of testimony as would authorize a new trial on that ground, the verdict will not be interfered with [7 Wend., 380; 6 Cow., 682]. *Supreme Ct., III. Dist.*, 1862, Honsee *a.* Hammond, 39 *Barb.*, 89.

46. A purchaser at foreclosure sale is entitled to appeal from an order setting aside the sale, but the court will not interfere except in a very strong case. *Supreme Ct.*, 1864, Mortimer *a.* Nash, *Ante*, 229.

47. Upon a remittitur from the Court of Appeals being filed in the court below, the latter court has no power to render any other judgment than one simply adopting that of the Court of Appeals as its own. *Supreme Ct.*, 1862, MacGregor *a.* Buell, *Ante*, 31.

Highways; Executors and Administrators, 7, 8.

APPEARANCE.

1. An appearance of a corporation, by officers of the court, will be valid, and give jurisdiction, whether the service of process upon its officers be good or not: provided the corporation be still in existence. *Supreme Ct., I. Dist., Sp. T.*, 1863, Murray *a.* Vanderbilt, 39 *Barb.*, 140.

2. A voluntary appearance in an action gives jurisdiction, and cures defects in previous process, but will not justify a judgment on failure to answer without proof of the actual service of the summons. *N. Y. Superior Ct., Chambers*, 1860, Macomber *a.* Mayor, &c., of New York. *Ante*, 35.

Attorney, 6.

ARREST.

1. To justify an order of arrest for fraud in obtaining credit, the affidavit must state the particular representations made, and in what respect they were false. A general allegation of falsity is not enough. *Supreme Ct., Chambers*, 1863, Draper *a.* Beers, *Ante*, 163.

2. Under an agreement that a manufacturer should consign his wares to B. & M. for sale, and that C. & H., who had guaranteed such notes as might be taken by B. & M., should receive, collect, or otherwise in their discretion dispose of the same; such notes, and their proceeds in the hands of C. & H., are received in a fiduciary capacity for account of the manufacturer, and may be followed in the hands of any person not a purchaser for value. *Supreme Ct., I. Dist., Chambers*, 1863, Chaine *a.* Coffin, *Ante*, 441.

3. An order of arrest may be granted against the debtors in an action to recover moneys received in a fiduciary capacity, although the action seeks incidental equitable relief against transferees of the trust fund. *Ib.*
4. After a trial by the court, and a decision directing judgment for money, on the ground that it was received in a fiduciary capacity, the court refused to vacate an order of arrest which had been granted on the same ground. *Ib.*
5. After a judgment has been vacated on the application of the defendant, with leave to him to answer, which he does, and with a provision that the judgment shall however stand as security, it is no longer to be regarded as a judgment within the meaning of the provision of section 183 of the Code of Procedure, which authorizes orders of arrest to be made only before judgment. The defendant continues liable to arrest, in a proper case, until the litigation ends in a judgment which finally determines the rights of the parties in the action. *N. Y. Superior Ct.*, 1861, Mott *a.* The Union Bank, 8 *Bosw.*, 191.
6. An order of arrest, issued as a provisional remedy under the Code, may be made returnable within a specified period after the arrest of the defendant. It is not essential to name a day certain. *N. Y. Superior Ct.*, 1861, The Continental Bank *a.* De Mott, 8 *Bosw.*, 696.

ASSESSMENTS.

It seems, that the act of 1858 (574, ch. 338), empowering justices of the Supreme Court to set aside assessments for fraud or legal irregularity, entitles a property-owner to relief, where the street commissioner, by fraudulently over-estimating the quantity of rock excavation in grading a street, has awarded the contract for the work to a person apparently, but not truly, the lowest bidder. Matter of 80th street, *Ante*, 324.

HIGHWAYS; TAXES.

ASSIGNABILITY OF CAUSE OF ACTION.

1. A cause of action for damages for the fraud and deceit of the defendant in the false reading of the hour of appearance named in a summons served upon the plaintiff's assignor in a justice's court, by means of which a judgment was obtained against him without any defence, is not assignable. The wrong alleged is pure fraud and deceit practiced upon the assignor. It had no relation to his property, and could only reach his estate by misleading him. The false imposition is a personal wrong; but the torts which have been held to be assignable are injuries which have had their first and direct effect upon specific

rights. The law requires parties to redress in their own behalf the wrongs directed against themselves, and, if they fail to do this, such causes of action die with the person, and they are not allowed to be transferred as instruments of litigation into other hands. *Oneida Co. Ct.*, 1864, Lamphere *a.* Hall, 26 *How. Pr.*, 509.

2. A cause of action for a false return of service of a summons in justice's court, when in fact no service had been made, whereby a wrongful judgment was obtained against him on the defendant's failure to appear, is not assignable. *Supreme Ct., V. Dist.*, Ford *a.* Chandler, cited in *Ib.*

ASSIGNMENT.

1. It is well settled that a mortgage passes by an assignment of the bond to which it is collateral, on the ground that the incident follows the principal debt; but the bond does not pass by an assignment of the mortgage. The assignment of the mortgage without the bond, in such a case, is a nullity. *Supreme Ct., VII. Dist.*, 1863, Cooper *a.* Newland, *Ante*, 342.
2. Circumstances from which it may be inferred that an assignment of judgment, absolute upon its face, is a mere device to withdraw such judgment from the operation of a set-off in favor of the judgment-debtor. Butler *a.* Niles, 26 *How. Pr.*, 61.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Where an assignment for the benefit of creditors provided for a preference to those named "in the annexed schedule," and such schedule was not made till two days after the delivery of the assignment, there being evidence of entire good faith on the part of assignor and assignee, *Held*, that both the assignment and schedule were valid. *Supreme Ct., I. Dist.*, 1864, Hotop *a.* Neidig, *Ante*, 332.
2. If an assignment is valid when made, and vests the title in the assignee, neither the omission of the assignor to deliver an inventory, nor any omission of duty by the assignee in the execution of the trust, will reach back and render the assignment invalid. *Supreme Ct., VI. Dist.*, Juliand *a.* Rathbone, 39 *Barb.*, 97.
3. An assignment for the benefit of creditors is not, under the provisions of the act of 1860, inoperative or fraudulent or void, because the assignor fails to make the inventory or schedule within the time required by section 2; or because the assignee fails to give a bond within the time required by section 3. The statute must be held to be directory merely, both upon principle and authority. [4 Seld., 13, 328; 34 Barb.,

620; 6 Wend., 486; 10 Ib., 663; 11 Ib., 604; 16 Johns., 135; 19 Wend., 143; 12 Ib., 481; 14 Barb., 298; 23 Ib., 313; 26 Ib., 586; 6 Hill., 42; 2 Ib., 329; 3 Ib., 43; 7 Ib., 9; 3 Mass. 230.] *Supreme Ct., VI. Dist.*, 1862, Juliand *a.* Rathbone, 39 *Barb.*, 97.

ATTACHMENT.

1. An attaching creditor, after the levy of his attachment, is entitled to the benefit of the statutes against fraudulent conveyances, in respect to the property upon which he has secured his lien. *Ct. of Appeals*, 1863, Rinchey *a.* Stryker, 26 *How. Pr.*, 75.
2. Instituting an attachment in another State against the buyer of goods, to recover their price from him, does not affect the creditor's right of recovery in an action previously commenced by him in this State against third persons, to recover possession of the same goods on account of fraud in the sale. *N. Y. Superior Ct.*, 1861, King *a.* Phillips, 8 *Bosw.*, 603.

ATTORNEY AND CLIENT.

1. Validity of contracts between attorney and client. Broch *a.* Barnes, 40 *Barb.*, 521.
2. The restrictions upon transactions between attorney and client discussed at length. Brotherson *a.* Consalus, 26 *How. Pr.*, 213.
3. An attorney may lawfully purchase judgments for the purpose of issuing executions and collecting the debts, notwithstanding the statute prohibiting attorneys from buying choses in action with the intent and for the purpose of bringing suits thereon. The policy of the law does not embrace such case [3 Barb. Ch., 630].

   So held, where after issuing executions he was restrained by order of the court, with leave to sue on the judgments. *Supreme Ct., IV. Dist., Sp. T.*, 1863, Brotherson *a.* Consalus, 26 *How. Pr.*, 213.
4. Creditors, on whose behalf the attorney of their debtor has, without authority from them, received a mortgage made by the debtor in their favor, may ratify the act by a subsequent assent, and enforce the mortgage. *N. Y. Superior Ct.*, 1861, Brown *a.* Platt, 8 *Bosw.*, 324.
5. The lien which an attorney is said to have on the judgment is merely a claim to an equitable interference of the court to have the judgment held for his debt [12 Mees. and W., 451; 37 Eng. L. and Eq., 470]. And *it seems* that his lien is confined to the costs of the particular suit, and does not constitute the attorney an assignee of the judgment in such a sense as to entitle him to go into another court to enforce his lien by action in his own name. *Supreme Ct., V. Dist.*, 1863, Adams *a.* Fox, 40 *Barb.*, 442.

6. Where a party to an action has appeared by an attorney, his adversary is not at liberty to deal with the party himself in the management of the action. *Supreme Ct., I. Dist., Sp. T.*, 1863, Chadwick *a.* Snediker, 26 *How. Pr.*, 60.

BANKING ASSOCIATIONS.

CORPORATIONS.

BILLS, NOTES, AND CHECKS.

1. Where one draws a bill of exchange payable to his wife, her indorsement of the bill gives the indorsee a title which enables him to recover upon it against the acceptor. The validity of the indorsement does not depend upon a question of contract or obligation as between the husband and wife; but by his directing the bills to be paid to her order, she is made his agent to receive the money, and with the necessary authority to indorse and transfer the bill. *N. Y. Superior Ct.*, 1863, Lee Bank *a.* Satterlee, *Ante*, 6.
2. A bank having discounted a note for a dealer, is not liable for failing to charge a prior indorser, on the dishonor of the note. *Supreme Ct.*, 1864, Lake *a.* Artisans' Bank, *Ante*, 232.
3. *It seems*, that a bank to whom negotiable paper is delivered for collection merely, discharge their duty by a proper demand of payment, and by giving notice of non-payment to their principal, without giving the proper notice also to other indorsers, unless some contract or commercial usage be shown to raise a more extended obligation. *Supreme Ct., III. Dist.*, 1863, The State Bank of Troy *a.* The Bank of the Capitol, *Ante*, 364.
4. The duty and obligation of banks, acting as agents for the collection of negotiable paper, in respect to notifying indorsers, stated. *Ib.*

ACTION, 12.

BILL OF PARTICULARS.

A pleader, claiming on an account stated, who refuses to furnish the items of his demand, pursuant to section 158 of the Code of Procedure, should be precluded from giving evidence of such items further than may be necessary to prove the settlement of the sum due. *N. Y. Com. Pl.*, 1863, Goings *a.* Patten, *Ante*, 339.

CASE.

1. After judgment entered absolutely, a case or exceptions cannot be annexed to the judgment-roll for the purpose of review, except by special order. *N. Y. Superior Ct.*, 1863, Anderson *a.* Dickie, *Ante*, 83.

2. Where judgment was entered absolutely, the appellant subsequently made a case to which the respondent proposed amendments, and the case was settled on notice, but no leave was given to annex the case to the judgment-roll. *Held*, 1. That the judgment could be reviewed only for errors appearing in the judgment-roll itself. 2. That the respondent was regular in bringing the appeal to argument on the judgment-roll alone. *Ib.*
3. Under the 37th rule of the court of common pleas, the moving party must, within ten days after settlement of the case, file with the clerk of the court a copy of the case as settled, and the original papers containing the case and amendments as they came from the judge or referee. The object of the 37th rule was to compel him to file it with the clerk in ten days after settlement, under the penalty of its being declared abandoned. The ten days, by the rule, are computed from the time of the settlement, which is, when the case is settled by the judge, in the presence of the parties, or when the case, with the allowed amendments, or the corrections made by the judge, are delivered by him to the moving party, or, as is the habit in this court, to the clerk of the court. The party making up the case is then entitled to the possession of it for at least ten days, that he may prepare the copy of it as settled, which, under the forty-second rule, he is required to serve upon the opposite party eight days before the time of noticing for argument; and before the ten days have expired he is to file the original paper, that is, the case and amendments as they came from the judge or referee, with the corrections or allowances made by him, with the clerk. *N. Y. Com. Pl., Sp. T.*, 1864, Parker *a.* Link, 26 *How. Pr.*, 375.

AMENDMENT 6; APPEAL.

CAUSE OF ACTION.

1. A plaintiff cannot be permitted to recover judgment upon a cause of action not in existence at the commencement of his action. *Supreme Ct.*, 1863, Wattson *a.* Thibou, *Ante*, 184.
2. Where a debtor and creditor have made an agreement reciting the payment of the debtor's obligation, except a specified sum, an action by the latter to recover that balance is properly brought upon the original obligation, not upon the subsequent agreement. *Supreme Ct.*, 1863, Van Nest *a.* Talmage, *Ante*, 99.
3. In an action upon a bond in which there was a proviso that the obligors should "control and compromise" a suit, it is not necessary for the plaintiff to show affirmatively that the obligors were allowed to control and compromise the suit. This is not a condition precedent,

but a proviso or defeasance, which the obligors must set up by answer and maintain by proof. *Supreme Court, V. Dist.*, 1863, Jarvis *a.* Sewell, 40 *Barb.*, 449.

4. Where one erects a building upon the line of his own premises so that the eaves or gutters project over the land of his neighbor, the appropriate remedy is an action for a nuisance, and not an action of ejectment. *Supreme Ct., VII. Dist.*, 1863, Aiken *v.* Benedict, 39 *Barb.*, 400.

5. The grantee of land held adversely to the grantor, cannot maintain an action upon the deed against the person thus holding adversely, even though such grantee had no knowledge of the adverse possession. *N. Y. Superior Ct., Sp. T.*, 1861, Lowber *a.* Kelly, *Ante*, 452.

6. Where L. received from W. a deed of land which was held adversely by K., and, on W.'s refusal to bring ejectment, L. commenced an action against K. and W. to establish W.'s legal, and L.'s equitable title, W. not defending,—*Held*, that the action could not be maintained against K. *Ib.*

7. Under a covenant in a lease that the sub-cellar of the premises should be "free from percolation of water through the walls," an answer in an action against the tenants for rent, that during a period, exceeding several quarters, the water had percolated through the walls, and rendered the premises unfit for use, is not a claim for damages during each quarter respectively, to be set off against the rent due at the end of that quarter, but a claim for general damages as being caused by one continuous occurrence. *N. Y. Superior Ct.*, 1864, Benkard *a.* Babcock, *Ante*, 421.

8. An action by a creditor, to enjoin his debtor from making an assignment or disposing of his assets to the preference of other creditors, in violation of an agreement by which he had obtained credit from the plaintiff, and to have his assets appropriated *pro rata* between the plaintiff and other creditors, does not preclude the same creditor from bringing a subsequent action to recover judgment against the debtor upon the same indebtedness. The cause of action in the first case is upon an equitable demand triable by the court, and the costs are in the discretion of the court, and before the Code a court of law would have had no jurisdiction of the case. In the second case the cause of action arises upon express contract, is a legal demand, is triable by a jury and not by the court, and plaintiff's right to costs is absolute, and a court of equity strictly would have had no jurisdiction of the case. These causes of action are not the same, within the rule that a former action pending for the same cause abates the present action. *N. Y. Superior Ct.*, 1861, Paige *a.* Wilson, 8 *Bosw.*, 294.

9. The Code does not establish any new rule of determining the identity of causes of action in this respect. *Ib.*
10. A cause of action against a foreign corporation, as indorser of a promissory note, which, by its terms, is payable in the City of New York, is a cause of action arising within that city; and the Superior Court has jurisdiction thereof, though the plaintiff be a non-resident. *N. Y. Superior Ct.*, 1861, Spencer *a.* The Rogers Locomotive and Machine Works, *Ante*, 110.
11. In an action brought upon the bonds and coupons of a railroad corporation of another State, but *payable in this State*, the cause of action arises here, and this court has jurisdiction, though both parties are foreign corporations. [23 How. Pr. R., 180.] *Supreme Ct., I. Dist.*, 1863, Connecticut Mutual Life Ins. Co. *a.* Cleveland, &c., R. R. Co., 26 *How. Pr. R.*, 225.
12. A new substantive cause of action cannot be set up by supplemental complaint. *Supreme Ct.*, 1863, Wattson *a.* Thibou, *Ante*, 184.

ACTION; CLOUD UPON TITLE; FALSE IMPRISONMENT; LIBEL.

CERTIFICATE.

COMMON SCHOOLS.

CERTIORARI.

1. A common-law certiorari, to review the proceedings of a board of officers or inferior tribunal, may be granted on an *ex-parte* application. *Supreme Ct., Sp. T.*, 1864, Matter of Woodbine street, *Ante*, 112.
2. A certiorari does not lie to review proceedings in a habeas corpus case, until after a final determination of the case: it does not lie upon an order committing defendant for a false return. *Supreme Ct., I. Dist.*, 1863, Husted's case, *Ante*, 326, *note.*
3. The allowance or refusal of a writ of certiorari to review the proceedings of local public authorities in laying assessments and awarding damages, rests in the sound discretion of the court. *Supreme Ct., I. Dist.*, 1864, Matter of 80th street, *Ante*, 324.
4. In such cases, the writ should be refused, to avoid public inconvenience, where the relator has other adequate remedy by legal proceedings. *Ib.*
5. A certiorari to review an ordinance directing a local improvement, must be applied for immediately: it should be refused, if the applicants have suffered such delay that the assessment has been made and partly collected and paid over. *Supreme Ct., II. Dist., Sp. T.*, 1858, Matter of Tompkins square, *Ante*, 324, *note.*
6. Several writs of certiorari may be issued in one case, where this is

necessary in order to bring up the entire record. *Supreme Ct., Sp. T.*, 1864, Matter of Woodbine street, *Ante*, 112.

7. A certiorari issued under 2 Rev. Stat., 736, § 27, which requires the district attorney to sue out the writ when judgment shall have been stayed upon any indictment, brings up the indictment as well as the exceptions. *Supreme Ct., I. Dist.*, 1863, People *a.* Monnais, *Ante*, 345.
8. A conviction will not be reversed on the ground that, in the return to the writ of certiorari, it merely appears that the jury was regularly impannelled, without the words "and sworn." *Supreme Ct., I. Dist.*, 1864, Reynolds *a.* People, *Ante*, 413.
9. Where it appears by the return to a writ of certiorari that the inferior tribunal or officer was without jurisdiction, it is immaterial whether the relator raised the objection in the proceeding under review, or not. *Supreme Ct., II. Dist.*, 1863, The People *on rel.* Lord *a.* Robertson, 26 *How. Pr.*, 90.

CHATTEL MORTGAGE.

1. Under the provision of the Laws of 1833, ch. 270 (2 *Rev. Stat.*, 3d ed., 196), which requires chattel mortgages to be refiled annually, "together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof," a statement is sufficient which annexes and refers to another document filed with it, if the two papers, read together in connection with the original mortgage, disclose the interest of the mortgagee intelligibly. *N. Y. Superior Ct.*, 1861, Beers *a.* Waterbury, 8 *Bosw.*, 397.
2. On refiling a chattel mortgage, which, by its terms, was given to secure the payment of notes, and also to secure the mortgagee against outstanding liabilities, the statement annexed was that the amount of the unpaid notes constituted the amount of the mortgagee's interest, and made no reference to any claim that the mortgage was held as a security against the outstanding liabilities. Such outstanding liabilities then, in fact, existed, and a copy of an agreement between the parties, which was annexed and filed with the statement, and referred to in it, stated that the mortgage was given to secure such outstanding liabilities. But this agreement was made some months before the making and filing of the statement; *Held*, that as against subsequent purchasers, the renewal of the mortgage was good as to the amount claimed as due upon the notes; but it was not good as to any of such outstanding liabilities. *Ib.*
3. An understatement of the amount due does not affect the validity of the mortgage as to the amount which is stated; but the mortgagee cannot as against the parties designed to be protected by the statute,

afterwards claim that any greater sum is secured by the mortgage than is mentioned, in terms or by intelligible reference, in his statement. *Ib.*

4. Notice of the facts, to render such a defective statement sufficient as against subsequent purchasers, must be actual notice, not merely of the mortgage, but of the actual amount for which the mortgage was held as security when they purchased. *Ib.*
5. A chattel mortgage was given to secure, among other things, liabilities of the mortgagor assumed by the mortgagee, and the schedule annexed specified money paid for taxes to the amount of $300, and the complaint in an action to foreclose the mortgage claimed only the payment so specified; but on the trial proof was received, without objection, of the payment of another tax, and its recovery was allowed; *Held*, that this was error, for as against subsequent purchasers not having any notice of the mistake by which this other tax was omitted, only the amount specified in the schedule could be recovered. *Ib.*

CITY COURT OF BROOKLYN.

It is the duty of the City Court of Brooklyn to grant a new trial where a verdict against evidence has been rendered. *Supreme Ct.*, 1864, Suydam *a.* The Grand-street and Newtown Railroad Company, *Ante*, 304.

CIRCUIT COURTS OF THE UNITED STATES.

Congress may give the circuit courts exclusive jurisdiction in any cases in which the Supreme Court of the United States has appellate jurisdiction. *Supreme Ct., I. Dist.*, 1864, Jones *a.* Seward, *Ante*, 377.

CLOUD UPON TITLE.

Mere threats and designs against the grantee in possession of real property, accompanied by declarations of the invalidity of his deed are not to be deemed a cloud upon title. *Supreme Ct., I. Dist., Sp. T.*, 1863, Mad. Ave. Bapt. Ch. *a.* Mad. Ave. Bapt. Ch., 26 *How. Pr.*, 72.

COMMON SCHOOLS.

1. A certificate, issued under the Laws of 1851, ch. 386, § 11—making it the duty of the city superintendent, under general regulations of the Board of Education, to examine into the qualifications of persons proposed as teachers of common schools in the city of New York, and to grant certificates,—need only specify in which class of schools the person is qualified to teach. *N. Y. Common Pleas*, 1863, Gildersleeve *a.* Board of Education, *Ante*, 201.
2. And where, under this statute, and a by-law of the Board of Education

which required that the certificate given should express the grade of the teacher, the superintendent gave a certificate expressing the grade, and that the teacher was qualified as first assistant of a grammar school:

Held, in the absence of evidence of any further regulation of the board, that the teacher might lawfully serve as principal of the primary department of a grammar-school. *Ib.*

3. The power of the board of trustees to employ teachers under the same statute, coupled with the general authority to conduct and manage the schools, necessarily implies the right to remove them, especially under a by-law of the Board of Education regulating the proceedings on such removal. *Ib.*
4. The power of the city superintendent, under the same statute, to annul the certificate given to any teacher, is distinct from the power of the trustees to remove a teacher. *Ib.*
5. Under section 10, subd. 7, of the same statute, which authorizes the trustees by the vote of a majority to declare vacant the seat of any trustee who shall refuse to attend three stated meetings, the tender by a trustee of his resignation, with its acceptance by a majority, renders his seat vacant. *Ib.*

COMPLAINT.

1. In an action by "F. H. & J., commissioners of highways," the complaint commenced: "The plaintiffs, commissioners of highways, complain." *Held*, that a cause of action in the plaintiffs, as commissioners, could be proven. *Supreme Ct.*, 1863, Fowler *a.* Westervelt, *Ante*, 59.
2. In actions brought by the plaintiff in a representative capacity, an averment in the body of the complaint of such representative capacity, and also that the action is brought by him in such capacity, is sufficient to sustain a recovery in that capacity. *Ib.*
3. A complaint against executors, &c., seeking to charge them in their representative capacity, cannot be sustained on demurrer, if the facts alleged show only a personal liability on their part. *Supreme Ct., I. Dist., Sp. T.*, 1864, Bartlett, *a.* Hatch, *Ante*, 461.
4. In an action in the Superior Court of the City of New York, against a foreign corporation, where the complaint states a cause of action of which the court has jurisdiction, it is unnecessary to aver that the plaintiff resides within the City of New York. *N. Y. Superior Ct.*, 1861, Spencer *a.* The Rogers Locomotive and Machine Works, *Ante*, 110.
5. Where the complaint against the indorser of a promissory note, alleges due demand, non-payment and protest, and that the defendant had due

notice of such non-payment and protest, it is sufficient, without averring notice of the demand also. *Ib.*

6. Where the complaint alleges an agreement between the defendant and A., and an assignment of it by A. to the plaintiff, the plaintiff cannot recover by proving such an agreement between himself and the defendant. [*Per* Bosworth, Ch. J.] *N. Y. Superior Ct.*, 1860, Curtiss *a.* Marshall, 8 *Bosw.*, 22.

7. Under a complaint claiming title to land, and demanding a judgment establishing it and directing a conveyance from the defendants, the plaintiffs cannot recover damages on proving merely a breach of a covenant as to adjacent premises. *N. Y. Superior Court*, 1861, Van Zandt *a.* The Mayor, &c., of New York, 8 *Bosw.*, 375.

8. Under a complaint alleging that defendant wrongfully took and detained goods, to the damage of the plaintiff $5,000, but without any allegation of special damage, the plaintiff may recover damage from depreciation resulting by reason of the lapse of time. *N. Y. Superior Ct.*, 1861, Young *a.* Willet, 8 *Bosw.*, 486.

9. Under such a complaint, evidence that the goods depreciated from change in the market value or from decay arising from inherent causes, and not resulting from any neglect on the part of the defendants, is admissible. *Ib.*

10. In the complaint in an action on judgment, it is necessary to aver that leave to prosecute the action had been obtained. Under section 71 of the Code of Procedure,—declaring that no action shall be brought upon a judgment rendered in any court of this state, except a court of a justice of the peace, between the same parties, without leave of the court for good cause shown on notice, &c.,—leave to prosecute is a condition precedent to the right of action on the judgment. Hence, according to rules of pleading, such permission should be averred, or the complaint fails to show a cause of action. A cause of action is synonymous with right of action—a right of recovery, and a complaint which does not show a right of recovery, fails to show a cause of action. The complaint should state facts sufficient, if admitted or proved, to authorize a recovery of judgment. But the holding of a judgment against a party merely, does not, since section 71 of the Code was adopted, give a right of recovery on it. As a condition precedent to a right of recovery thereon by a party to a judgment, leave to prosecute must be obtained of the court. Without an allegation that such permission has been obtained, the complaint fails to show a cause of action. *Supreme Ct., IV. Dist.*, 1864, Graham *a.* Scripture, 26 *How. Pr.*, 501.

11. A complaint alleged that the defendant made a note in the name of

a third person, payable to an insurance company of which plaintiff was receiver, for insurance made by the company, and that the company issued the policy upon no other consideration than the note and the advance premium, relying on the authority of the defendant to execute the note. It also set forth the proceedings in an unsuccessful suit against the pretended principal on the note, and demanded judgment for the costs of that suit, together with the full amount of the note, the assessments for losses being equal to that amount; and, upon plaintiff's recovery, the amount of the note, less the assessment paid, was made the measure of damages, as if the action had been upon the note; but the allegations and proof showed that the share of the losses of the company chargeable upon the note during the time covered by the policy prior to its surrender, were equal to the amount of the note.

Held, that it was to be regarded as an action on the implied warranty by the defendant that he was agent, and not upon the contract. On the facts stated, the law implies a warranty of authority by the defendant to execute the note, and it was unnecessary, under our present system of pleading, to allege that legal inference. [4 Coms., 249, 253.] In an action on the note as the contract of the defendant, a claim for the costs of a suit to enforce the note against the pretended principal would be absurd. And no question having been made before the jury as to the proper measure of damages, none could be made on an appeal to the Court of Appeals. The judgment must therefore be sustained. *Ct. of Appeals*, 1863, White *a.* Madison, 26 *How. Pr.*, 481.

12. If the action were on the note, proof that the maker was in default would be necessary; but if it is on a warranty, such proof is not necessary. *Ib.*

13. If the action were to be regarded as an action simply to charge the defendant as the maker of the note, the record in the case of the unsuccessful action against the alleged principal would not be admissible against the defendant. But resting the plaintiff's right of recovery upon the warranty, the record is admissible to show that the plaintiff had been subjected to the expenses of an action in attempting to enforce the contract against the principal whom the defendant undertook to bind. These expenses, the action being brought in good faith, were a legitimate item of damages in the present action. [37 L. & E., 275; S. C., 86 Eng. C. L. R., 786; 40 Eng. L. & E., 182.] *Ib.*

14. Where a complaint is susceptible of no other interpretation than a charge of illegal arrest, detention and restraint of liberty, the action is to be regarded as one of false imprisonment and not of malicious prosecution. *N. Y. Superior Ct.*, 1864, Burns *a.* Erben, 26 *How. Pr.*, 273.

15. Under a complaint framed to set aside an assignment merely on the

ground of fraud, it is not competent for the plaintiff, on a failure to obtain the principal relief, to insist on a judgment settling the construction of the instrument. *Supreme Ct., I. Dist.*, 1864, Hotop *v.* Neidig, *Ante*, 332.

16. Under the liberal system of amendments established by the Code of Procedure, a judgment of contribution, in a proper case, may be sustained although the complaint demanded the recovery of a specific sum. *Supreme Ct., III. Dist.*, 1862, Denman *a.* Prince, 40 *Barb.*, 213.

17. Instances of scandalous and irrelevant matter in a complaint in an action for conspiracy. Mussina *a.* Clark,* *Ante*, 188.

PLEADING.

CONFESSION OF JUDGMENT.

A judgment by confession in a justice's court, invalid by reason of an omission to annex an affidavit as required by statute, is void only as against *creditors.* It is valid and binding upon the *defendant* notwithstanding such omission. [2 Cow., 548; 3 Rev. Stat., 5th ed., 444, § 106.] *Supreme Ct., V. Dist.*, 1863, Stone *a.* Williams, 40 *Barb.*, 322.

CONFLICT OF LAWS.

An insurance policy which was made in this State, by a New York company, in favor of American citizens, in pursuance of an agreement abroad by the company's agent, and which was countersigned by such agent abroad, as required by its terms in order to render it binding, must, when drawn in question in the courts of this State, be judged by the laws of this State, in the absence of any evidence as to the foreign law. *N. Y. Superior Ct.*, 1861, Huth *a.* The N. Y. Mutual Insurance Company, 8 *Bosw.*, 538.

CONSTITUTIONAL LAW.

1. Section 5 of the Act of Congress of March 3, 1863, relating to habeas corpus, and regulating judicial proceedings in certain cases,—which provides that the defendant in any action for arrest or other trespass, &c., done under color of the authority of the president, or any law of Congress, may have such action removed into the Circuit Court of the United States,—is constitutional and valid. *Supreme Ct., I. Dist.*, 1864, Jones *a.* Seward, *Ante*, 377.

* An appeal was taken to the general term from this decision, and after the argument of the appeal, and before any decision had been rendered thereon, the plaintiffs withdrew the complaint, and an order for a judgment of discontinuance was entered.

2. No court has a right to declare a legislative act unconstitutional unless it is glaringly so. *N. Y. Superior Ct., Chambers*, 1860, Macomber *a.* Mayor, &c., of New York, *Ante*, 35.
3. This rule applies with peculiar force to the action of a single judge on a collateral motion. *Ib.*

CONTEMPT.

An executor being enjoined by order of the surrogate from further action as executor until the conclusion of a controversy then pending, began an action in his own name, as executor, in the Supreme Court:—

Held, not a contempt of court for which the surrogate would direct an attachment to issue. The surrogate has no power to direct or control the conduct of executors, &c., in other courts. *N. Y. Surr. Ct.*, 1863, Beebe *a.* Hatch, 1 *Redf.*, 475.

CONTRACTS.

1. Under a contract for the purchase of goods, where the right of property is not passed by the contract, the buyer is not bound to accept the articles when tendered, unless they correspond in quantity with what was bargained for. *N. Y. Superior Ct.*, 1864, Reimers *a.* Ridner, *Ante*, 292.
2. The purchaser of goods at sea, of the quantity of which he cannot be presumed to be aware, is not bound to accept part of the quantity bought, any more than if the goods were in a distant warehouse. *Ib.*
3. Where, under a contract as follows, "Sold to R. 733 bags saltpetre to arrive on board ship A.," the seller tendered 393 bags, about half the saltpetre on board having been destroyed by the sea, it appearing, however, that the ship A. arrived with 786 bags on board;—*Held*, that the purchaser was not bound to receive the quantity tendered. *Ib.*

CONVERSION.

1. The omission or refusal to pay over moneys received by a factor, agent, or trustee, in the course of his agency or trust, will not lay the foundation of an action of trover. [Paley on Ag., 79; 1 Ves. Jr., 424; 16 N. Y., 250.] *Supreme Ct., V. Dist.*, 1863, Harris *a.* Schultz, 40 *Barb.*, 315.
2. Where a party intrusts property to a partnership to sell and realize thereon, as his agents and factors, and pay over the proceeds to him, they do not, upon a sale by them, become tort-feasors, as upon an unauthorized disposal thereof, so as to authorize an action of trover against any of them alone. Their liability rests upon contract, and not on tort, and is necessarily joint and not several. *Ib.*

3. In such a case, an action for a refusal to account for and pay over the proceeds of property sold by them, brought against one of the partners only,—*Held*, on demurrer, defective for the nonjoinder of the other partner. *Ib.*

CORPORATIONS.

In proceedings to enforce the liability of stockholders, &c., of banks, under the act of 1849, if there should be, after assessing the stockholders, a sum in the hands of the receiver more than was expected at the time of the assessment, it will be applied, so far as necessary, to payment of creditors in preference to being distributed among the stockholders. *Supreme Ct., III. Dist., Sp. T.*, 1863, Pruyn *a.* Van Allen, 39 *Barb.*, 355.

COSTS.

1. The provisions of the Revised Statutes (2 *Rev. Stat.*, 90, § 41) forbidding the recovery of costs against executors or administrators, except in certain cases, and referred to in section 317 of the Code, apply only to the general costs of the action, and have no reference to appeal or interlocutory costs. *Supreme Ct., I. Dist.*, 1864, Hunt *a.* Connor, *Ante*, 466.
2. The provisions of 2 Rev. Stat., 90, § 41,—directing that costs shall not be awarded in actions brought against executors or administrators in their representative capacity, except for unreasonable resistance, neglect or refusal to refer the claim,—do not affect actions brought against the deceased in his lifetime, and revived by his executors or administrators. *N. Y. Com. Pl., Chambers*, 1863, Mitchell *a.* Mount, *Ante*, 213.
3. A plaintiff recovering judgment in an action where a warrant of attachment as a provisional remedy has been issued, but subsequently set aside by the court, is not entitled to an allowance under § 308 of the Code. *N. Y. Superior Ct., Sp. T.*, 1863, Iselin *a.* Graydon, 26 *How. Pr.*, 95.
4. Where the plaintiff unites in the same action a claim that is not disputed with one that is, the defendant may remove from the controversy the undisputed claim by the offer under § 385 of the Code of Procedure, and thus make the subsequent costs of the litigation depend upon the result of the litigation in regard to the disputed claim. *Supreme Ct., II. Dist.*, 1863, Budd *a.* Jackson, 26 *How. Pr.*, 398.
5. The "more favorable judgment" spoken of in section 385 of the Code, which he must recover to entitle him to costs, does not mean, in the case of a money demand upon which interest is accruing, a sum greater, at the time of the report or verdict, than the sum offered. The test is the sum due to the plaintiff at the time of the offer, and not

that sum increased with the interest intermediate the date of the offer and the date of the report or verdict,[1 Duer, 694; 15 How. Pr.,420]. *Ib.*

6. Thus, when the sum named in the written offer was $357.44, and the sum found due the plaintiff by the referee was $397.14, being $19.73 in excess of the sum expressed in the offer, but such excess was not equal to the interest from the time of the offer to the date of the report;—*Held*, that the plaintiff had failed to obtain a more favorable judgment, and the defendant was entitled to costs. *Ib.*

7. Where, upon the death of a plaintiff, after final judgment in his favor, his personal representatives bring an action upon the judgment, to obtain the same relief as was formerly obtained in such cases by a writ of *scire facias*, it is in the discretion of the court to allow costs or not. *N. Y. Superior Ct.*, 1861, Ireland *a.* Litchfield, 8 *Bosw.*, 634.

8. *It seems*, that in an action in the nature of a *scire facias* the costs follow the recovery as a matter of course. *Supreme Ct., IV. Dist., Sp. T.*, 1863, Brotherson *a.* Consalus, 26 *How. Pr.*, 213.

9. Where a motion to dismiss the action, for neglect to try, is denied on plaintiff's showing ground for so doing, the terms imposed on him should be, payment of defendant's costs from the time at which plaintiff suffered the cause to go off the calendar. *N. Y. Com. Pl., Sp. T.*, 1864, Corbett *a.* Claflin, *Ante*, 418.

10. Where, on an appeal from the decision of a surrogate, the decision is affirmed by the Supreme Court, and on appeal to the Court of Appeals both decisions are reversed "without costs," the appellant is not entitled to costs in either court. *Supreme Ct.*, 1862, Macgregor *a.* Buell, *Ante*, 31.

11. There is no limit to the number of term-fees taxable for terms in which a cause has been necessarily on the calendar of the Court of Appeals. *N. Y. Superior Ct.*, 1863, Glentworth *a.* Mount, *Ante*, 15; *Supreme Ct.*, 1863, Shaw *a.* Dwight, *Ante*, 18.

12. The provision of section 307, subdivision 7, of the Code of Procedure, as amended in 1858 and 1862,—by which term-fees are given "for every circuit or term, not exceeding five circuits and five special and five general terms,"—gives term-fees for every term during which a cause is necessarily on the calendar of the Court of Appeals, and is not heard, or is postponed by order of the court; but does not limit the term fees in that court to five. *N. Y. Superior Ct.*, 1863, Glentworth *a.* Mount, *Ante*, 15.

13. Under the Laws of 1840, 1844, and 1854, costs are now properly allowed on a common-law certiorari. *Supreme Ct., I. Dist.*, 1864, People *on rel.* Cook *a.* Board of Police, *Ante*, 324, *note.*

AMENDMENT, 5.

COUNTER-CLAIM.

1. The right of the plaintiff to claim, and the right of the defendant to counter-claim, upon any given or supposed facts in controversy, must be reciprocal. *Supreme Ct.*, 1862, Agate *a.* King, *Ante*, 159.
2. Thus, in an action for the foreclosure of a mortgage, defendants not personally liable to pay the amount secured, cannot interpose a counter-claim arising out of transactions unconnected with the subject of action. *Ib.*
3. In an action not upon contract, a counter-claim which does not arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or which is not connected with the subject of the action, is inadmissible. *N. Y. Superior Ct., Chambers*, 1864, Henry *a.* Henry, *Ante*, 411.
4. In an action for a divorce on the ground of defendant's adultery, the defendant cannot set up, by way of counter-claim, the adultery of the plaintiff, and claim judgment of divorce against plaintiff, if the allegation is proved. *Supreme Ct., VII. Dist.*, 1862, R. F. H. *a.* S. H., 40 *Barb.*, 9. Johnson, J., dissented.
5. The subject of an action for a divorce is the alleged wrongful act of the defendant, and the alleged adultery of the plaintiff is not "connected with the subject of the action" within the meaning of §150 of the Code, so as to constitute it a proper counter-claim within that section. *Ib.* Compare DIVORCE, 5.
6. In an action by a mortgagee of chattels to foreclose the mortgage and to obtain a personal judgment for the debt, subsequent purchasers of the mortgaged property cannot avail themselves of a demand in favor of the mortgagor, against the mortgagee, as a counter-claim. *N. Y. Superior Ct.*, 1861, Beers *a.* Waterbury, 8 *Bosw.*, 397.
7. A demand not set up as a counter-claim, in the answer, cannot be recovered as such. *N. Y. Superior Ct.*, 1861, Beers *a.* Waterbury, 8 *Bosw.*, 396.

COURT

1. Under the Laws of 1846, 4, ch. 2,—where it provides that whenever the trial of a cause shall have been commenced in the Court of General Sessions of New York, "and the same shall not be concluded before the expiration of the term of said court, it shall be lawful for the said court to continue in session until the conclusion of said trial, and to proceed to judgment, if they shall so deem necessary, in cases where convictions shall be had,"—the court may, while prolonging its session after the expiration of the term, for the purpose of concluding a trial,

pass sentence on a prisoner convicted before the expiration of the term. *Ct. of Appeals*, 1863, Lowenberg *a.* People, 26 *How. Pr.*, 202.

2. By the terms of a lease made in 1837, in case of disagreement as to the rent, application was to be made for the appointment of appraisers to "the chancellor of the state of New York for the time being."

Held, 1. That the parties intended the Court of Chancery, and not the mere incumbent of the office.

2. That the Supreme Court being the lawful successor and recipient of the powers and duties formerly vested in the Court of Chancery, was the proper tribunal to which to apply for the appointment of appraisers. And a justice at special term may make the order, on notice. *Supreme Ct., III. Dist.*, 1861, N. Y. Central R. R. Co. *a.* Saratoga and Schenectady R. R. C., 39 *Barb.*, 289.

COURTS OF SESSIONS.

The provision of the laws of 1859 (*Laws of* 1859, 465, ch. 208) providing that it shall be lawful for "the court of sessions of any county of this State" to continue its sittings at any term thereof so long as it may be necessary, in the opinion of such court, for the despatch of any business or the determination of any cases that may be pending before such court,—is applicable to the Court of General Sessions of the Peace in and for the city and county of New York. That court is but a court of sessions for the county of New York. A court of general sessions of the peace and a court of sessions of any county, are one and the same tribunal. [14 Abbotts' Pr., 91.] *Ct. of Appeals*, 1863, Lowenberg *a.* People, 26 *How. Pr.*, 202.

CREDITORS' ACTION

Where a judgment creditor commences an action against his debtors and their assignees, and obtains a judgment declaring the assignment void, and appointing a receiver, he has an equitable lien upon the assets, which dates from the commencement of the action. *So held*, even where no injunction was issued. *N. Y. Superior Ct.*, 1861, Field *a.* Sands, 8 *Bosw.*, 685.

CRIMINAL LAW.

1. Where the Court of Sessions, on sentencing to death a convict of murder, designated in the warrant the day of execution, instead of leaving it for the governor to designate;—*Held*, that the error did not entirely vitiate the sentence, and was not ground for a reversal of the judgment. *Ct. of Appeals*, 1863, Lowenberg *a.* People, 26 *How. Pr.* 202.

2. The "act in relation to capital punishment and to provide for the more certain punishment of the crime of murder" (*Laws of* 1860, p. 712) did not abolish all punishment for murder "of the first degree." It clearly affirms the common-law right to execute persons convicted of murder in the first degree. It nowhere professes to abolish the penalty of death for that crime; and the right to inflict it is recognized in several different sections. The fact that the act so amended a section of the Revised Statutes as to declare that persons convicted of murder should be punished as therein provided, and that the section providing the mode of taking the lives of persons so convicted was expressly repealed, does not make the common-law mode of inflicting the death penalty inapplicable to cases where that punishment is recognized by such act or the Revised Statutes as amended by that act. *Ct. of Appeals*, 1863, People *a.* Lowenberg, 26 *How. Pr.*, 202.

DAMAGES.

1. In an action to recover the possession of specific personal property, or the value thereof in case a return cannot be had, and for damages, the plaintiff may recover damages arising from the depreciation of the goods, during the wrongful detention by the defendant. *N. Y. Superior Ct.*, 1861, Young *a.* Willet, 8 *Bosw.*, 486.
2. It is unimportant whether the decrease in value arises from the defendant's act or default, or from other causes. *Ib.*
3. In an action by the owner of leasehold premises, for damages for an injury thereto, without malice, and from a cause which could be ascertained and its continuance prevented at a moderate expense, it is error to estimate the damages at the difference between the value of the lease before and after the injury. *N. Y. Superior Ct.*, 1861, Terry *a.* The Mayor, &c., of New York, 8 *Bosw.*, 504.
4. Though the jury may, in an action for false imprisonment, give damages beyond a mere compensation to the plaintiff for his injuries, and inflict a punishment upon the defendant for his conduct, yet such damages must not be arbitrary. *Supreme Ct., II. Dist.*, 1863, Brown *v.* Chadsey, 39 *Barb.*, 253.
5. In an action for forcible and malicious injuries, the jury may give punitive damages. *N. Y. Superior Ct.*, 1861, Walker *a.* Wilson, 8 *Bosw.*, 586.
6. In an action for trespass, in wrongfully entering the plaintiff's office, and there making a disturbance and a violent assault upon the plaintiff's clerk, it appeared that the defendant went there for the purpose of demanding payment of a small debt, with the malicious intent of provoking a quarrel with the clerk in case he was not paid; and that

he assaulted and wounded the clerk in pursuance of this intention: *Held*, that a verdict of $400 damages was not excessive. *Ib.*

7. Rule of damages, in an action by a principal against his brokers for unlawfully selling stocks deposited with them as collateral security for advances, &c. Brass *v.* Worth, 40 *Barb.*, 648.

EVIDENCE, 44, 61, SHERIFF, 5.

DEBTOR AND CREDITOR.

DEFENCES, 13; DEMAND BEFORE SUIT, 4; REDEMPTION; SHERIFF, 4; SUPPLEMENTARY PROCEEDINGS, 3–5.

DEED.

The president and secretary of a corporation executed an assignment of its property, and attached the seal of the company thereto, without any specific authority from the company to do so:—*Held*, not a proper execution of the instrument, and that the want of authority on the part of the officers could not be cured by any proof of execution made before the commissioner. *Supreme Ct., I. Dist., Sp. T.*, 1863, Murray *a.* Vanderbilt, 39 *Barb.*, 140.

EVIDENCE, 25.

DEFAULT.

The settled power of the court to set aside inquests, and to open defaults in its discretion, for the purpose of attaining justice by a fair trial, may be exercised even after open and confessed negligence. *Supreme Ct.*, 1863, Leighton *a.* Wood, *Ante*, 177.

INQUEST; JUDGMENT, 3, 4.

DEFENCES.

1. The acceptor of a bill cannot defend on the ground that the drawer's signature was not his true name. *N. Y. Superior Ct.*, 1861, Clafflin *a.* Griffin, 8 *Bosw.*, 689.
2. The recovery of judgment by defendants against plaintiff having been given in evidence by way of set-off, the defendants are at liberty to avail themselves of such recovery as an estoppel, if the record so warrant, without regard to the theory of the answer. *Supreme Ct., I. Dist.*, 1864, Collyer *a.* Collins, *Ante*, 467.
3. A judgment in favor of the owner of a vessel against the builder, for

damages for a failure to complete the vessel according to contract, is a bar to an action by the builder for extra work performed during the building of the vessel. (SUTHERLAND, J.; to the contrary, LEONARD, J.) *Ib.*

4. The fact that the plaintiff has availed himself of his cause of action as a counter-claim against the present defendants in an action still pending, is a bar to his action. (SUTHERLAND, J.; to the contrary, LEONARD, J.) *Ib.*

5. A plaintiff who has set up his cause of action as a counter-claim against the same parties in a previous suit, should be put to his election between the two modes of relief, but is not otherwise barred by the former action. (LEONARD, J.; to the contrary, SUTHERLAND, J.) *Ib.*

6. In an action where the defendant may set up his counter-claim or set-off in answer to the plaintiff's demand, he has his election to do so or to bring a cross action. (LEONARD, J.) *Ib.*

7. An agent has no right to dispute the title of his principal to moneys received by him for the principal's use. Nor has he a right to resist an action for the amount so received on the ground that the money was paid on an illegal contract between the original parties [1 B. & P., 3; 1 Ib., 296; 3 Story R., 182]. *Supreme Ct., I. Dist., Sp. T.*, 1863, Murray *a.* Vanderbilt, 39 *Barb.*, 140.

8. Under the practice as sanctioned by the Code, the defendant in an action to recover the possession of lands, may rely upon any equitable defence he may have. If he holds under an agreement to purchase, he may set up the same facts which in a court of equity would entitle him to a conveyance of the land. [12 N. Y., 266.] *Supreme Ct., II. Dist.*, 1863, Traphagen *a.* Traphagen, 40 *Barb.*, 537.

9. An action conflicting under the Revised Statutes respecting the determination of claims to land (2 *Rev. Stat.*, 313, § 3) is, under the Code, subject to the same rules as all other actions; and the same defences to defeat the right to such relief may be set up by the defendant, and also equitable relief by way of counter-claim. *N. Y. Superior Ct.*, 1864, Peck *a.* Brown, 26 *How. Pr.*, 351.

10. The fact that the plaintiff's action is a substitute for a former special proceeding (if it be so exclusively, and not one to remove a cloud upon the title), does not deprive the defendant of the right granted by the Code (§ 150) of setting up equitable defences in any kind of actions. [12 N. Y. R., 266; 17 Ib., 270.] *Ib.*

11. In ejectment by the purchaser of land at a sheriff's sale, against the judgment-debtor, the latter cannot avail himself of the fact that he had sufficient personal property to satisfy the execution on which his land was sold. His remedy was to apply for relief against the execution or

the sale. *Supreme Ct., VII. Dist.*, 1863, Lathrop *a.* Singer, 39 *Barb.*, 396.

12. In an action of a nature which was formerly cognizable at law, the plaintiff is not required to anticipate and avoid matters of defence, and is at liberty to disprove or impeach them, although he has put in no reply. *Supreme Ct.*, 1863, Van Nest *a.* Talmage, *Ante*, 99.

13. The giving of a negotiable security for a demand does not preclude the debtor from setting up a defence which was in existence when the security was given.

So held, where the action was upon such subsequent security, and not upon the original demand. *Supreme Ct., I. Dist.*, 1864, Hancock *a.* Palmer, *Ante*, 335.

14. A defendant relying on an account stated, if he fails to prove that it was mutually adjusted, and the balance ascertained, may fall back upon the accounts and prove that there is, in fact, a balance due him, unless his pleading is so framed as to show that he relies solely on the account stated. *N. Y. Com. Pl.*, 1863, Goings *a.* Patten, *Ante*, 339.

15. The objection that the plaintiff, a foreign administrator or executor, cannot maintain an action in this State in his representative capacity, applies merely to his capacity to sue; and it is waived unless taken by demurrer or answer. *N. Y. Superior Ct.*, 1863, Robbins *a.* Wells, 26 *How. Pr.*, 15.

ANSWER; COUNTER-CLAIM; DIVORCE, 5, 6; EVIDENCE, 71, 72, 73; LANDLORD AND TENANT, 3; LIMITATIONS OF ACTIONS; RECOUPMENT.

DEMAND BEFORE SUIT.

1. Where an agent for the purchase of land paid for it with money part of which he lent to his principal, and part of which belonged to his principal, and, without his principal's knowledge or assent, took the conveyance in his own name;—*Held*, 1. That the principal could maintain an action for a conveyance of the land, without making a tender of the money the agent had advanced, and a demand of a conveyance.

2. That as the principal was the equitable owner, one who was in possession under him could maintain trespass against the agent for interfering with the premises.

3. That the equitable right of such possessor was a defence to him in an action of ejectment brought by the agent to recover possession. *Supreme Ct., III. Dist.*, 1862, Safford *a.* Hynds, 39 *Barb.*, 625.

2. A vendee of goods under an executory contract of sale, who refuses to perform, and to receive the goods, has no interest subject to levy,

but if the sheriff, having an execution against him, seizes the goods while directed to him, and unclaimed by any other person, a demand on the sheriff is necessary before an action for the conversion will lie by the vendor. *Supreme Ct., I. Dist.*, 1863, Hicks *a.* Cleveland, 39 *Barb.*, 573.

3. If the vendor assigns the claim for the price under the contract of sale, or the goods themselves, this does not transfer a right of action for the previous conversion. The assignee must demand the goods before he can sue the sheriff. *Ib.*

4. Demand necessary before suit for money loaned to be on credit on the borrower's books. Payne *a.* State, 39 *Barb.*, 634. Compare Carroll *a.* Cone, 40 *Ib.*, 220.

DEMURRER.

The joinder of unnecessary parties defendant does not justify a demurrer for defect of parties. *Supreme Ct.*, 1864, Kolls *a.* De Leyer, *Ante*, 312.

Defences, 15.

DEPOSITION.

1. Under the act of 1840,—authorizing a judge of the N. Y. Common Pleas having issued a summons to a witness whose deposition is required to inforce obedience as in case of a subpœna,—the power of the court or judge is not restricted to enforcing the attendance of the witness. It is an essential part of the power to compel the witness, after appearing, to testify. Moreover the Revised Statutes expressly authorize courts of record to punish for contempt "all persons summoned as witnesses, for refusing or neglecting to obey such summons, or to attend or be sworn or answer as such witness." And where the witness who attends before the court in pursuance of such mandate, and is duly sworn, the court has power to require him to answer proper questions, on pain of contempt, whether the examination is conducted by the judge personally, or by counsel in his presence. *N. Y. Com. Pl., Sp. T.*, 1864, Clark *a.* Brooks, 26 *How. Pr.*, 254.

2. It is not an essential pre-requisite to a proceeding for contempt in such case that the witness should have been specifically directed by the court to answer some particular question addressed to him. No doubt, where the refusal arose simply from a belief that a particular question was objectionable, that course would and should, as matter of practice, be adopted. But where the object of the refusal was to test the question of the power of the court, and where the counsel for

the witness in open court, advised the witness to refuse to answer; a general refusal is enough. But if such advice was given and acted on in good faith, the court will give the witness another opportunity before issuing an attachment. *Ib.*

3. A deposition, taken on commission issued at the instance of one party, may be read in evidence by the other party, at the trial, although the former refuses to read it. *N. Y. Superior Ct.*, 1861, Weber *a.* Kingsland, 8 *Bosw.*, 415.
4. *It seems*, that the objection that a question, put on an examination *de bene esse*, was a leading question, cannot be raised at the trial, for it is in the discretion of the judge taking such examination, to permit a leading question when necessary. Weber *a.* Kingsland, 8 *Bosw.*, 415.

DETERMINATION OF CONFLICTING CLAIMS.

Defences, 9.

DISCOVERY AND INSPECTION.

1. The discovery of books, papers, or documents will not be ordered except upon positive proof that the papers sought to be discovered contained evidence which relates to the merits of the action. Nor is it enough that the papers probably will furnish information leading to the discovery of material evidence. *N. Y. Superior Ct*, *Sp. T.*, 1863, Morrison *a.* Sturges, 26 *How. Pr.*, 177.
2. The provisions of the Revised Statutes, empowering the court to compel a discovery of books, papers, or documents, as well before as after issue, are not abrogated by section 388 of the Code, which affords merely an auxiliary remedy. *Ib.*
3. These provisions of the Revised Statutes being stringent should be enforced only in cases free from doubt. *Ib.*
4. An order requiring the deposit of all the account-books of a party with the clerk for ten days, is not sustainable in an ordinary case. *Supreme Ct.*, *I. Dist.*, 1863, Julio *a.* Ingalls, *Ante*, 448, *note.*
5. A petition for discovery must show the precise point on which information is desired. *Ib.*

Executors and Administrators, 10.

DISMISSAL.

The fact that defendant has had the cause reserved generally, does not make it his duty to keep it upon the calendar. If the plaintiff suffers

it to go off the calendar, the defendant may move to dismiss the action for neglect to prosecute. *N. Y. Com. Pl., Sp. T.*, 1864, Corbett *a.* Claflin, *Ante*, 418.

EVIDENCE, 68; JUDGMENT, 11.

DIVORCE.

1. Cruel and inhuman treatment, to justify a limited divorce, need not consist of injury to the person of the complaint. *Supreme Ct.*, 1863, Bihin *a.* Bihin, *Ante*, 19.
2. Thus, a husband who, in presence of his wife, and in spite of her entreaties, unmercifully beats her child, inflicts an injury to her feelings, which is cruel and inhuman within the meaning of the statute. *Ib.*
3. Demeanor calculated to provoke annoyance, discontent, and disgust, is not alone enough to authorize a judgment of separation, especially where such conduct was practiced by both parties. *Supreme Ct., Sp. T.*, 1863, Conklin *a.* Conklin, *Ante*, 20, *note.*
4. What misconduct authorizes a limited divorce. Bihin *a.* Bihin, *Ante*, 19.
5. Adultery committed by the plaintiff is a perfect defence to an action for absolute divorce, and is also a ground for affirmative relief in the same action. *N. Y. Superior Ct.*, HOFFMAN, Referee, Anonymous, *Ante*, 48. Compare COUNTER-CLAIM, 5.
6. In an action for a limited divorce, on the ground of cruelty, the defendant is not at liberty to set up the adultery of the plaintiff either as a defence or as a counter-claim. *N. Y. Superior Ct., Chambers*, 1864, Henry *a.* Henry, *Ante*, 411.
7. The plaintiff in an action for divorce on the ground of adultery is not precluded from bringing a second action for a divorce for subsequent acts of adultery with the person with whom the defendant is charged with adultery in the first action. Although the plaintiff might have resorted to a supplemental complaint in the former action, the practice is not compulsory. *Supreme Ct., I. Dist.*, 1863, Cordier *a.* Cordier, 26 *How. Pr.*, 187.
8. The provision in a judgment for divorce awarding to the wife the custody of the children ceases to operate at her death; and the father becomes entitled to their custody again upon that event. Matter of Robinson, *Ante*, 399, *note.*
9. A judgment of divorce may be vacated for irregularity, affecting the jurisdiction of the person, even after the prevailing party has married again; but this should be done with hesitation, and only after the

gravest and most careful consideration. *Supreme Ct.*, 1863, Wortman *a.* Wortman, *Ante*, 66.

10. From reasons of public policy, the court will set aside a judgment of divorce, shown to be obtained by collusion or fraud, even though it had been followed by marriage of the successful party; but in such case it must be made apparent that the moving party is acting from good motives, and not from any expectation of personal advantage, such as regaining a support. *Supreme Ct., Sp. T.*, 1863, Singer *a.* Singer, *Ante*, 66, *note.*

ALIMONY; EVIDENCE, 74-76.

DOWER.

1. The widow of the owner of the equity of redemption is not barred of her right to dower in surplus moneys arising on a foreclosure, by her failure to assert her claim in proceedings to obtain the surplus, where the person to whom such surplus has been paid has not been induced to take any action or part with any thing, and has sustained no injury, by the widow's neglect;—*So held*, in favor of a doweress against her husband's assignee. *Supreme Ct.*, 1864, Mathews *a.* Duryee, *Ante*, 256.
2. Nor is the right of dower in such case barred by the pendency of an action by the assignee, asking the direction of the court in distributing the fund, in which action the doweress, though a party defendant, failed to answer. *Ib.*
3. The consent of a doweress to accept a certain amount in lieu of dower, may be inferred from her claim to the benefit of a judgment in her favor for such amount, in an action to recover her dower. *Supreme Ct.*, 1864, Mathews *a.* Duryee, *Ante*, 256.
4. The sum in gross to be allowed by judgment to a widow in lieu of dower from a fund treated in equity as land, is properly estimated on the basis of the annuity tables, adopted by Rule 84 of the Supreme Court. *Ib.*

ADMEASUREMENT.

EJECTMENT.

In an action to recover possession of lands, the plaintiff must recover, if at all, on the strength of his own title, not merely on the weakness of the defendant's. *N. Y. Superior Ct.*, 1861, Brady *a.* Hennion, 8 *Bosw.*, 528.

DEFENCES, 11.

ELECTION OF DOWER.

DOWER, 3.

ELECTION OF REMEDIES.

A plaintiff who has commenced a second action for divorce, on the ground of adultery, committed with the person with whom the adulterous intercourse is charged in the first action, will be required to elect between the two actions. *Supreme Ct., I. Dist.*, 1863, Cordier *a.* Cordier, 26 *How. Pr.*, 187.

DEFENCES, 5, 6; EXECUTORS AND ADMINISTRATORS, 22.

EQUITY.

That courts of equity will relieve against penalties and forfeitures. *Supreme Ct., III. Dist.*, 1862, Spaulding *a.* Hallenbeck, 39 *Barb.*, 79.

INJUNCTION, 2; JURISDICTION, 4, 5.

ESTOPPEL.

DEFENCES, 2.

EVIDENCE.

I. *Presumptions.*

1. The legal presumption is against the probability that a proprietor of land would designedly and gratuitously sacrifice a valuable property right, and the consent and agreement ought to be established by the clearest and most satisfactory evidence. *Supreme Ct., III. Dist.*, 1862, Corning *a.* Troy Iron and Nail Co., 39 *Barb.*, 311. A former judgment in this case is reported, 34 *Ib.*, 485.
2. In cases of collision between a horse-car upon a street-railroad and an ordinary vehicle which can traverse all parts of the street, any presumption of negligence is against the driver of the latter. *Supreme Ct.*, 1864, Suydam *a.* The Grand-street and Newtown Railroad Co., *Ante*, 304.
3. A presumption is raised against a will, where suspicions of undue influence are created by reason of the advanced age, blindness, and imbecility of the testator, which must be removed by clear and satisfactory evidence, beyond the mere facts of the existence of the will and the capacity of the testator. *Kings Surr. Ct.*, 1854, Turhune *a.* Brookfield, 1 *Redf.*, 220.

APPEAL, 29–31.

II.—*Burden of Proof.*

4. The act of March, 1850 (*Laws of* 1850, ch. 82, p. 117)—for the protection of purchasers of real estate upon sales made by order of surrogates—throws upon the party seeking to impeach such sale the whole burden of proof; and if he fails to show a want of jurisdiction in the surrogate to make the order, the law presumes that it was properly made. *Supreme Ct., V. Dist.*, 1863, Wood *a.* McChesney, 40 *Barb.*, 417.

5. In an action upon a collector's bond, for his failure to pay over to the county treasurer all the moneys directed in the tax warrant to be paid to him, the burden of proof is upon him to show that the failure to pay arose from his inability to collect the sum except by compulsory measures against the taxpayers. *Supreme Ct., III. Dist.*, 1862, Fake *a.* Whipple, 39 *Barb.*, 339.

6. Where the mortgagee of chattels, after default, and with the mortgagor's consent, sells them, a creditor of the latter, asserting fraud in the sale, holds the burden of proof. Fraud is not presumed from the fact of possession in the mortgagor, and not in the mortgagee, when the latter made the sale. *Supreme Ct., VII. Dist.*, 1863, Tahman *a.* Smith, 39 *Barb.*, 391.

III.—*Opinions of Witnesses.*

7. Questions referring to the appearance of a promissory note as it was exhibited at the trial, as whether the body of the instrument and the signature were written with the same ink: whether there appears to be an erasure on the note; whether the erasure was made before or after the body of the note was written; and whether either of the edges were cut edges or the ordinary foolscap edges;—*Held*, proper as calling for facts, apparent and obvious, to which the attention of the witness might be directed, and not designed to elicit opinions. *Supreme Ct., II. Dist.*, 1863, Dubois *a.* Baker, 40 *Barb.*, 556.

8. As to the writing upon the erasure, and whether it was made before or after the body of the note was written, if that rested in opinion, it was a question upon which the witness, who was a bank-cashier, was qualified to speak as an expert. [Cow. & H., 1418; 4 Hill, 131; 7 Cush., 595.] *Ib.*

9. Whether it is competent for a plaintiff to testify, as evidence in chief, that he sold and delivered the goods, relying on the truth of the alleged misrepresentations, *quære?* Shaw *a.* Stine, 8 *Bosw.*, 157.

10. That it may be relevant to ask of a competent witness, within what distance could such a train as that in question be stopped with ordi-

nary brakes, on an ascending grade, running at such a rate that a man could run faster than the train was going. Mott *a.* The Hudson River Railroad Company, 8 *Bosw.*, 345.

11. On the trial of an action for damages sustained by plaintiff by reason of a fire communicated from a steam-dredge of the defendant's, a witness was asked whether he considered it dangerous to use a steam-dredge without a spark-catcher.

Held, that the question was properly overruled; it not being a question of science or skill, and not falling within the rule relating to evidence by experts. *Supreme Ct., VII. Dist.*, 1863, Teall *a.* Barton, 40 *Barb.*, 137.

12. And a question to a witness, whether he had ever known any accident to happen from sparks from a dredge at the same distance from the dredge;—*Held*, improper also. *Ib.*

13. Medical testimony as to the personal injuries likely to be produced under a given state of facts is admissible, where the witness states the precise facts upon which he bases his opinion, and the court does not withdraw from the jury the right or liberty to consider whether these facts were established by the testimony. [12 N. Y., 358; 3 Park. Cr., 622.] *Supreme Ct., III. Dist.*, 1862, Wendell *a.* Mayor, &c., of Troy, 39 *Barb.*, 329.

14. Upon a trial involving the question of the mental imbecility of the testator or grantor, a non-professional witness cannot be asked the broad question whether, at the time referred to, such person was out of his mind;" nor the question "was he so affected in his mind as to be unfit for transacting his business." *N. Y. Superior Ct.*, 1861, Deshon *a.* The Merchants' Bank, 8 *Bosw.*, 461.

15. A question to a person injured, viz.: "State to the jury the effect of that injury upon you, and how your situation is?" is unexceptionable where the answer merely details the nature and extent of the injury, and states only facts within his knowledge, and not matters of opinion requiring professional skill in their just formation. *N. Y. Superior Ct.*, 1861, Creed *a.* Hartman, 8 *Bosw.*, 123.

INFRA, *tit.* VI., *Particular Facts and Issues*, 44, 50, 54, 60–64.

IV. *Admissions and Declarations.*

16. Although a sealed instrument executed by an agent who has only a parol authority, is not good in general, and will not sustain an action against the principal, yet admissions contained in it are competent evidence against the principal. *Supreme Ct.*, 1863, Morrell *a.* Cawley, *Ante*, 76.

17. Thus, in an action for use and occupation of demised premises, the rent reserved in a sealed lease which was executed by defendant's agent, but is void for want of sealed authority to execute it, furnishes, as against the defendant, the measure of damages. *Ib.*

18. Admissions of the grantor in a deed, made against his own interest, and tending to establish a sufficient consideration for the deed, he being an original party to the record, and identified in interest with the plaintiffs;—*Held*, admissible in evidence as a part of the *res gestæ*. [1 Greenl. Ev., §§ 109, 171.] *Supreme Ct., III. Dist.*, 1862, Spaulding *a.* Hallenbeck, 39 *Barb.*, 79; former decision, 30 *Ib.*, 292.

19. In an action to recover possession of land, for a breach of the condition upon which it was conveyed, brought by the heirs of the grantor against the grantee;—*Held*, that the declarations of the grantor showing a performance of the condition were admissible. *Supreme Ct., III. Dist.*, 1862, Spaulding *a.* Hallenbeck, 39 *Barb.*, 79.

20. In an action against a ship-owner to recover the amount of advances made to compromise a demand for salvage, evidence that the defendant claimed and received from the underwriters his share of the insurance on the basis of an adjustment of general average, which included the advances made by plaintiff;—*Held*, an admission of defendant's liability for such advances. *Supreme Ct.*, 1863, Lobach *a.* Hotchkiss, *Ante*, 88.

21. In an action against a married woman, her admissions are competent evidence. *Supreme Ct.*, 1863, Morrell *a.* Cawley, *Ante*, 76.

22. Evidence of acts and declarations by an accomplice, in the absence of the principal, is properly received, if followed by evidence of complicity sufficient to be submitted to the jury.

So held, on the trial of a prisoner for a rape, for which he had been indicted jointly with the accomplice. *Supreme Ct., I. Dist.*, 1863, People *a.* Monnais, *Ante*, 345.

23. Before evidence of the acts and declarations of persons not parties to the action can properly be received in evidence, on the ground that the evidence tends to prove a common intent or purpose to hinder, delay, or defraud creditors, the common unlawful design should be clearly proved as a condition precedent to receiving evidence of such acts and declarations. Evidence which is merely admissible on the question of the common illegal purpose, is not sufficient. *Supreme Ct., VII. Dist.*, 1863, Jones *a.* Hurlburt, 39 *Barb.*, 403.

24. The question whether there was a common intent or purpose to defraud creditors, is not a question for the jury. It should be confined exclusively to the court. [7 Wend., 57.] *Ib.*

V. *Documentary Evidence.*

25. The mere production of an ancient deed by the party claiming under it, does not entitle him to read it in evidence without further proof. *N. Y. Superior Ct.*, 1862, Fogal *a.* Pirro, *Ante*, 113.
26. Mode of proving a judgment or decree of the privy council of England, made on appeal from a decision of the executive council or court of appeal in Canada. Jarvis *a.* Sewell, 40 *Barb.*, 449.
27. Where a judgment of non-suit is offered in evidence, parol evidence is admissible to rebut a possible inference that the non-suit was granted on account of some formal defect in the prosecution of the action. It is always competent to show by parol the grounds on which a verdict or judgment was rendered, when the grounds become material and do not appear in the record. [8 Wend., 10, 45; 4 Comst., 71, 75.] *Ct. of Appeals*, 1863, White *a.* Madison, 26 *How. Pr.*, 481.
28. The defendants set up as a bar a judgment in their favor rendered in another court for the same cause of action. *Held*, that plaintiff might show *aliunde*, that such judgment was not given upon the merits, but on the ground that the action was prematurely brought, and therefore not a bar. [5 Barb., 469.] *N. Y. Superior Ct.*, 1864, Wilcox *a.* Lee, 26 *How. Pr.*, 418.

APPEAL, 32; INFRA, *tit.* VI., *Particular Facts and Issues*, 49; SUPPLEMENTARY PROCEEDINGS, 5; SURROGATES' COURTS, 6.

VI. *Particular Facts and Issues.*

29. Where a person being a single man and having no family, produces evidence tending to show that his residence was in a particular town during a certain year, such evidence may be counteracted by showing that during such year he did not vote or pay taxes in such town, and that the conduct on his part and the circumstances of his business relations tended to fix his residence in the town where he was assessed and taxed. [5 Greenl., 396; 4 Barb., 522.] *Supreme Ct., IV. Dist.*, 1864, Hitt *a.* Crosby, 26 *How. Pr.*, 413.
30. Hearsay evidence is admissible to show the death of a person after a considerable lapse of time [9 Cow., 140; 15 Johns., 226; 5 Peters, 470; Ib., 86], but it is not receivable when the alleged death was of recent occurrence, and when it may fairly be supposed that other and more satisfactory evidence could be obtained. [5 Cow., 319; 7 Cranch, 290.] This rule applied in a peculiar case, the supposed death being only six years past. *N. Y. Com. Pl.*, 1863, Stouvenel *a.* Stephens, 26 *How. Pr.*, 244.

31. On a trial for murder, or manslaughter, evidence that deceased was notorious for acts of violence dangerous to life and limb, and that from the relations between the deceased and the prisoner such fact was known to the latter, is admissible. But where it did not appear that the character of the deceased was known to the prisoner,—*Held*, that evidence of the brutal, quarrelsome, and bloodthirsty disposition of the deceased, and of his reputation for violence, was properly excluded. *Supreme Ct., I. Dist.*, 1864, Reynolds *a.* People, *Ante*, 413.

32. Where an applicant for a policy of life insurance untruly represented to the general agent of the insurance company, and also to its medical examiner, that he was a moneyed man, and the company in defending an action on the policy offered to show that the medical examiner would have recommended the rejection of the risk, if the truth had been disclosed to him;—*Held*, that the evidence was inadmissible. *Supreme Ct.*, 1863, Valton *a.* National Loan Fund Life Assurance Society, *Ante*, 268.

33. In determining whether an assignment absolute upon its face was in fact a mere cover to a secret trust that the assignor might reclaim the property when he should deem proper, the consideration is material only so far as what was given tends to show such secret trust. *N. Y. Superior Ct., I. Dist., Sp. T.*, 1863, Butler *a.* Niles, 26 *How. Pr.*, 61.

34. To show that a particular debt was included in an assignment of assets made by partners on the dissolution of their firm, it is admissible to prove, by a witness, that it was included, and was specified in the inventory prepared for the purpose, without producing the inventory. *N. Y. Superior Ct.*, 1861, Platt *a.* Thorn, 8 *Bosw.*, 574.

35. In an action in which the defendants had set up a counter-claim, one of them, being examined as a witness, testified that the demand had been assigned, among other things, to himself by the other defendant;—*Held*, that the defendants might prove by another witness, that the demand was expressly excepted from the assignment, and that the defendant who had taken the assignment had agreed to defend the suit and enforce the counter-claim for the benefit of both defendants. *Ib.*

36. On an issue as to the terms and good faith of a partnership, the instructions given to the conveyancer who drew the partnership articles are admissible as a part of the *res gestæ*. *Supreme Ct.*, 1863, Valton *a.* National Loan Fund Life Assurance Society, *Ante*, 268.

37. The fact that a bank, being employed to collect indorsed negotiable paper, assumed to send notices to all parties, ready to be forwarded, is some evidence, but not sufficient, alone, to show an agreement to notify all. *Supreme Ct., III. Dist.*, 1863, The State Bank of Troy *a.* The Bank of the Capitol, *Ante*, 364.

38. The plaintiffs, a bank employed to collect a draft, sent it to the defendants, their local correspondents at the place of payment, for collection; and the latter, upon its dishonor, returned notice thereof to the former, with notices also addressed to each of the prior indorsers. These notices were by the plaintiffs forwarded to their respective addresses; but the one addressed to the only solvent indorser contained a clerical error, upon the ground of which he successfully defended himself, when sued on his endorsement, and recovered judgment for costs against the holder of the draft. The latter then sued the plaintiffs in this action for their negligence in the agency, and recovered judgment for the amount of the draft, and for the costs of the first action. The plaintiffs now sued their sub-agents, who had prepared the erroneous notice, and recovered both the amount of the debt and the costs of the former actions.

Held, that there having been no proof of an agreement or of a commercial usage requiring the collecting agent to do more than give notice to his principal, and it not having been objected, on the trial, that the principal was misled by the error in the notice, the verdict could not be sustained. *Ib.*

39. Where it is proved that the bank, of which plaintiff is receiver, discounted the note sued on, at the full legal rate for the time it had run, and required the indorser to give them his check for $200, in pursuance of an agreement to that effect on which it was discounted, and and the next day charged this check against the credit given on the discount, a verdict finding usury should be sustained. Charging the check in account, shows that the indorser was to have the use of only $300, less the discount on $500, and was to pay therefor interest on $500. *N. Y. Superior Ct.*, 1861, Butterworth *a.* Pecare, 8 *Bosw.*, 671.

40. Upon such facts it would be proper to instruct the jury to find for the defendants. *Ib.*

41. A receipt having been identified by a witness as signed by him, it is proper to allow the adverse party to ask for what purpose the receipt was given, though the receipt itself has not yet been offered in evidence. *Ib.*

42. If the witness, in answer to such question, states the contents of the receipt, an objection must be taken to the answer. An objection to the question alone is unavailing. *Ib.*

43. In an action to recover damages for injuries to plaintiff's interest in land, as a party in possession, under a contract of purchase;—*Held*, that evidence of the value of the premises, and of the cost of the buildings erected thereon, was competent for the purpose of showing the

situation of the property and the surrounding circumstances. *Supreme Ct., III. Dist.*, 1862, Honsee *a.* Hammond, 39 *Barb.*, 89.

44. It is also competent for plaintiff to prove the difference in the annual value of the property prior to, and since, the injury alleged, within the rule laid down by the authorities, as to opinions of witnesses. *Ib.*

45. The difference in the value of the property, at the two periods, is the proper rule of damages. *Ib.*

46. In a charter party of an American vessel, made in London, and executed only on the part of the owners and charterer of the vessel the following stipulations were inserted: "In consideration of this charter a commission of five per cent. on the gross amount of freight is now due by the owners (ship lost or not lost), to G. & Co." [who were the brokers who effected the charter], ... "for which the owners hereby give them a lien on the freight, and with them the original charter-party is to be deposited. Likewise, in consideration of this charter, the owners agree with G. & Co., that the vessel, upon her return to Europe, is to be consigned to and reported inwards at the Custom House by them or their agents at the outports or on the continent." In an action to recover compensation or damages upon the owners' neglect to make such consignment:

Held, that the omission to insert in such stipulations any thing respecting the broker's compensation for the consignment on the return voyage, is, at the most, only some evidence to be commented upon and submitted to the jury, that the owners were not to pay them any additional sum besides the commissions mentioned; and it does not preclude proof either of the actual agreement, or that a right to earn further commissions was, by the usage and course of trade, an incident to the consignment which was agreed to be made to them. *N. Y. Superior Ct.*, 1861, Weber *a.* Kingsland, 8 *Bosw.*, 415.

47. Proof, that on several other occasions the defendants had paid the plaintiff similar commissions to those they now claimed, is admissible, as being some evidence either that the defendants knew and assented to plaintiff's custom to make such charge, or knew that the charges were in conformity to the usage of trade. *Ib.*

48. Evidence that these brokers did more than half the business done in London with American ships, is incompetent to show a usage to pay such commissions. The custom of a particular house is not competent as proof of general usage. *Ib.*

49. A letter written by one of the defendants to another, nearly two years before the charter in controversy was made, and containing some statement as to what is the usual commission in such cases, was held

irrelevant, except that part of it which related to the usage as to commissions; but the admission of the whole letter was held not ground for disturbing the verdict. *Ib.*

50. It is objectionable to allow witnesses to state that if the vessel had been consigned as agreed, the brokers would have been entitled to commissions on a certain sum, it being the main question in the cause whether they would have been so entitled. *Ib.*

51. It was not error to refuse to instruct the jury that they would not have had a right to collect the whole of the inward freight, or that the charterers would have had a right to collect the balance after the unpaid charter money had been collected without paying commissions to the brokers, or that the recovery must be limited to the commissions on the amount of the charter money unpaid on the return of the ship. *Ib.*

52. The testimony of the owner's agent that the brokers had endeavored, after they had secured a charter at the sum he asked, to induce him while ignorant that they had done so, to consent to a lower sum, was competent as part of the *res gestæ*. *Ib.*

53. But this evidence having been excluded, the testimony of the charterers that they were not willing to take the charter at the sum asked by the owners' agent, unless the brokers would guarantee them against loss, was inadmissible. *Ib.*

54. It is not competent to ask a witness what he supposed, at the time, was the effect of a transaction, or to ask what impression was produced upon his mind by what passed. The inquiry should be what was said or done. *Ib.*

55. In an action brought by one of two parties upon a cause of action which accrued to the firm and had been released by the copartner to the plaintiff, a question put to a witness:—what was said by the plaintiff about commencing suit in New York rather than in London?—was excluded by the court:

Held, that if the word "plaintiff" was intended to refer to the copartner who had released, and who had been examined as a witness, the question was not competent except for the purpose of contradicting him or affecting his credibility. But if it was intended to refer to the actual plaintiff, the testimony was in its nature competent, and its relevancy could not be determined on the face of the question. *Ib.*

56. A survey is admissible in evidence, on the question of the conduct and good faith of the master. *N. Y. Superior Ct.*, 1860, Hathaway *a.* The Sun Mutual Insurance Co., 8 *Bosw.*, 34.

57. When it is stipulated that the statements therein contained are true, and shall have the same effect as evidence, and be subject to like ob-

jections as if deposed to under a commission, the statements of such survey, as to the condition of the vessel, the nature and extent of the injury to her, and the necessity of further repairs before proceeding on a particular voyage, are competent as evidence. *Ib.*

58. In an action for rent, where the defendants set up a breach of plaintiff's covenant in the lease, that the premises should be free from percolation of water, it is error to allow inquiries to be put to witnesses as to the injury to the value of the premises in consequence of the dampness thereof, without laying a proper foundation for such inquiries by showing a breach of the covenant during the time referred to. *N. Y. Superior Ct.*, 1864, Benkard *a.* Babcock, *Ante*, 421.

59. Testimony as to the injurious effect of moisture in such a case is not proper, without reference to the origin of the moisture; and the admission of such testimony is erroneous. *Ib.*

60. A witness who is shown to have hired stores, and is acquainted with their value, is not thereby shown to be an expert, and qualified to express an opinion as to the deteriorating effect of dampness in the cellar of the store, on its yearly value. *Ib.*

61. Such difference in yearly value is not a proper subject of proof by the opinions of witnesses. *Ib.*

62. Nor is it the proper measure of damages, where the lessees' interest in the term is not assignable. *Ib.*

63. Where a contract has been made for the construction of a thing,—*e. g.*, a vessel,—at a fixed price, the contractor cannot recover additional compensation, as for extra work, merely upon proof that such work was done at the defendant's request, and that he accepted the work when completed. The defendant's request, in the absence of further evidence, is deemed merely a notice of his claim that the contract calls for such work. *Supreme Ct., I. Dist.*, 1864, Collyer *a.* Collins, *Ante*, 467.

64. Though the meaning of terms used in a contract may be determined by usage, it is not competent for a witness familiar with the usage to testify as to what construction the contract bears. (LEONARD, J.) *Ib.*

65. In an action for breach of warranty, evidence which has a legitimate tendency to satisfy the jury that the warranty was not broken, or which may be material upon the question of damages, if there was a breach of the warranty in part only, is properly admissible, and its exclusion is sufficient ground to reverse the judgment. *Supreme Ct., IV. Dist.*, 1864, Lytle *a.* Erwin, 26 *How. Pr.*, 491.

66. In an action for a wrongful trespass by a stranger, on the premises held by the plaintiff as a lessee, the plaintiff need not produce the lease. Evidence of possession on his part under a claim of right by

written instrument is enough against a wrong-doer. *N. Y. Superior Ct.*, 1861, Walker *a.* Wilson, 8 *Bosw.*, 586.

67. In an action by the seller of goods to recover possession on the ground of fraud, evidence that after the purchaser had been allowed a considerable credit, the seller required him to give business paper for any further purchases, is not sufficient to prove as matter of law, that he had any doubt of the purchaser's solvency, or any suspicion of an adverse change in the condition of his business. *N. Y. Superior Ct.*, 1861, King *a.* Phillips, 8 *Bosw.*, 603.

68. After a course of dealing by sales on credit for several years, the buyer, being required by the seller to furnish business paper, stated that he would give business paper of merchants designated by him, to be delivered whenever the seller required, and after about three weeks from the time of sales made on these terms, the buyer failed and assigned, owing a large amount, and having demands due him to only one-half the amount he owed, and but little merchandise which had not been pledged, but having no notes or other demands against the merchants whose business paper he had agreed to give to the seller, except open accounts against some of them, which, together with his other demands, he had pledged to other creditors;—*Held*, that upon these facts, there was some evidence that the buyer was, and knew that he was, insolvent at the time of his purchases, and that in the absence of any explanation from him, a jury might find that his purchase was fraudulent. *Ib.*

69. In such a case, the question ought to be submitted to the jury; and an order dismissing the complaint cannot be sustained. *Ib.*

70. In an action to recover a strip of land lying along a boundary line, it is not enough for the plaintiff to show, that the defendant's lot as possessed by him is wider than the deeds under which he claims describe it to be, by the width of the disputed strip. *N. Y. Superior Ct.*, 1861, Brady *a.* Hennion, 8 *Bosw.*, 528.

71. In an action against a municipal corporation for injuries arising from a defect in a building within the corporate limits, their title is not sufficiently proved by evidence of a sign upon it, designating it as "Primary School No. 11," and that such sign had been on it ten years, and that it was used for a public school during that time. *N. Y. Superior Ct.*, 1861, Terry *a.* Mayor, &c., of New York, 8 *Bosw.*, 505.

72. In an action for trespass, the plaintiff proved title in himself, and at least a constructive possession, and that defendant knew he was cutting timber on the plaintiff's land. Defendant showed no right to cut timber, nor any connection with a stranger who claimed title. *Held*,

that the defendant, being a mere intruder, could not prove title in a third person for the purpose of defeating the action. *Supreme Ct., III. Dist.*, 1863, Miller *a.* Decker, 40 *Barb.*, 228.

73. But evidence that a stranger is in possession, is admissible for the purpose of rebutting and contradicting testimony given by the plaintiff of constructive possession in himself; although such possession in a stranger is not set up as a special defence in the answer. A general denial in the answer is sufficient to let in the evidence. [12 Barb., 575; 14 Ib., 537; 9 Ib., 219; Van Sant. Pl., 79, 409.] *Ib.*

74. In an action for false imprisonment, where no justification is pleaded, evidence offered by the defendant to show grounds for suspecting the plaintiff of the commission of a crime, is admissible only on the question of damages. If offered as a justification, it is inadmissible. *Supreme Ct., II. Dist.*, 1863, Brown *a.* Chadsey, 39 *Barb.*, 253.

75. Proof of two or three visits to a brothel, by a husband, unaccompanied by a woman, is not sufficient evidence of adultery to authorize a divorce. *N. Y. Superior Ct.*, Hoffman, *Referee*, Anonymous, *Ante*, 48.

76. While to authorize a divorce for adultery, direct proof of the actual commission of the crime is not required, yet the proximate facts must lead by a fair inference to a necessary conclusion, a conclusion so far inevitable that the supposition of innocence cannot by any just course of reasoning be reconciled with it. *Ib.*

77. The defendant in an action for a limited divorce, who offers to prove in his justification ill-conduct of the plaintiff, will be restricted to proof of what preceded, or was contemporaneous, with his own cruelty or misconduct. *Supreme Ct.*, 1863, Bihin *a.* Bihin, *Ante*, 19.

78. In actions involving questions of fraud, the intent is always a material inquiry; and for the purpose of establishing that, other acts of a similar character, done about the same time, may always be shown. *Supreme Ct., VII. Dist.*, 1862, Amsden *a.* Manchester, 40 *Barb.*, 158.

79. Thus, in an action to set aside a conveyance as fraudulent against creditors, it is competent to show that at or before the time, the grantor conveyed other property to different grantees without consideration and with intent to defraud his creditors. Such evidence is admissible, 1st, to show the situation of the debtor in respect to his property at the time of the transaction alleged in the complaint to be fraudulent, and what had been done with the property he previously had; and 2d, to establish the fraudulent intent charged in the complaint. *Ib.*

80. These facts may be shown by the reputation of the parties in respect to pecuniary means, in the town or neighbourhood where they were

accustomed to reside, on the question of the *bona fides* or *mala fides* of the transaction. [Cow. & H., Notes, 702.] *Ib.*

DEFENCES, 14; TRIAL, 9, 11.

EXAMINATION OF PARTIES.

1. An order for the examination of the adverse party, under section 391 of the Code, is allowed as a matter of right, upon proof that the action is at issue, and that the applicant desires such examination as to matters material to the issue. *Superior Ct., I. Dist.*, 1864, Cook *a.* Bidwell, *Ante*, 300.
2. In an action by a judgment creditor to set aside as fraudulent a conveyance of the debtor's property, the debtor who is named in the summons and complaint as a defendant, and against whom relief, at least as to costs, is sought, is a party, within the provisions of section 399 of the Code of Procedure,—relating to the examination of parties. *N. Y. Superior Ct.*, Aiken *a.* Baumann, *Ante*, 28, *note.*
3. Heirs-at-law are not the personal representatives of their ancestor within § 399 of the Code. *Supreme Ct.*, 1862, Spaulding *a.* Hallenbeck, 39 *Barb.*, 79; approving McCrary *a.* McCrary, 12 *Abbotts' Pr.*, 1.

EXCEPTIONS.

1. Where a cause is tried by the court without a jury, a refusal of the court to pass upon a question of fact not presented by the pleadings, is not the subject of an exception reviewable on an appeal from the judgment, if the court is not requested to pass upon it before the trial has been concluded and the decision filed. *N. Y. Superior Ct.*, 1861, Heroy *a.* Kerr, 8 *Bosw.*, 194.
2. An exception need not be more specific than the conclusion or finding to which it is taken. *Supreme Ct., I. Dist.*, 1864, Collyer *a.* Collins, *Ante*, 467.
3. Thus, where the only conclusion of law was, "that the defendant is indebted, &c.;—*Held*, that a general exception was sufficient to authorize the general term to review the various rulings implied by this conclusion. *Ib.*
4. It is regular to direct that an exception to an order dismissing the complaint, granted on the trial at the close of plaintiff's evidence, be heard at the general term in the first instance. *Supreme Ct.*, 1864, Lake *a.* Artisans' Bank, *Ante*, 232.
5. An exception to incompetent evidence cannot be disregarded on the ground that it must have been harmless, except in very clear cases. *N. Y. Superior Ct.*, 1861, Weber *a.* Kingsland, 8 *Bosw.*, 415.

6. A party excepting must, at his peril, place enough in his exceptions to show that the court erred to his prejudice. The legal presumption is in favor of the rectitude of the proceeding; and all decisions made will be presumed correct, until the contrary appears. When the error relied on consists in the exclusion of evidence offered, the exceptions must show affirmatively, that it was relevant at the time when offered and excluded. The court will not interfere on account of its rejection, unless, in connection with the evidence previously given, or that and evidence offered to be given, it can be seen to be material. *N. Y. Superior Ct.*, 1861, Van Amringe *a.* Barnett, 8 *Bosw.*, 358.
7. Where competent evidence has been received, subject to exception and to future decision as to its admissibility, an exception to this conditional admission becomes unavailable, in case the final decision is in favor of retaining the evidence. *Supreme Ct.*, 1863, Bihin *a.* Bihin, *Ante*, 19.
8. An exception to the decision of a judge, before whom a cause is tried without a jury, fails, if the conclusions of law stated and the judgment settled upon the decision do not pursue the decision in respect to the point excepted to, but are in conformity with the exceptant's view. *N. Y. Superior Ct.*, 1861, Beers *a.* Waterbury, 8 *Bosw.*, 396.
9. Where the allegations of an answer are such as entitled the defendant to a verdict if proved, and the plaintiff offers on the trial to admit them, and objects to the admission of any evidence on the part of defendants, on the ground that the answer constitutes no defence, he cannot avail himself of exceptions to subsequent errors in the admission of evidence in support of the answer. *N. Y. Superior Ct.*, 1861, Butterworth *a.* Pecare, 8 *Bosw.*, 671.

EVIDENCE, 41.

EXECUTION.

1. The surrogate has no power to order an execution to issue upon a judgment recovered against the executor for a debt of the deceased, unless it has been ascertained by an accounting what sum is properly applicable to the payment of the judgment; and then the execution can only be issued for the sum so applicable. *Supreme Ct., I. Dist.*, 1864, Mitchell *a.* Mount, *Ante*, 265.
2. A creditor having a judgment against an administrator for legal services rendered by him in the administration of the estate, is entitled, under the provision of 2 Rev. Stat., 116, § 19, to an order to show cause why an execution should not issue on such judgment. That provision of the statute does not refer solely to judgments for debts of

the deceased. *N. Y. Surr. Ct.*, 1863, Cowles *a.* Thompson, 1 *Redf.* 490; affirmed, *Ib.*, 493.

3. An execution against a married woman can only be resorted to, in order to enforce a judgment at law, and the execution can only reach property in which she has a separate legal estate, and which would be liable to levy and sale on execution if she were sole. *Supreme Ct., VII. Dist., Sp. T.*, 1862, Charles *a.* Lowenstein, 26 *How. Pr.*, 29.
4. Where the amount secured by a chattel mortgage has become due, though the property remains in possession of the mortgagor, he has no interest in the mortgaged property which can be levied on and sold by virtue of an execution against him. Upon the failure of the mortgagor to perform the condition of the mortgage, the mortgagee acquires an absolute title. [8 Johns., 96; 3 Wend., 498; 9 Ib., 80; 12 Ib., 61; 16 *Barb.*, 46; 6 Duer, 99; 3 Sandf., 609.] *Supreme Ct., III. Dist.*, 1862; Champlin *a.* Johnson, 39 *Barb.*, 606.
5. The provision of the act of April 10, 1850—exempting the homestead of a householder from sale on execution—does not contemplate the exemption of a homestead from sale on execution issued upon a judgment for a cause of action sounding in *tort*; nor on an execution issued in such action on a judgment for the defendant for *costs*. *Supreme Ct., VII. Dist.*, 1863, Lathrop *a.* Singer, 39 *Barb.*, 396.
6. The lien of an execution dates from the time of its delivery to the sheriff, whether in or out of office hours. *Supreme Ct., III. Dist.*, 1862, France *a.* Hamilton, 26 *How. Pr.*, 180.
7. In selling property upon execution, the sheriff acts by virtue of a statutory authority which must be strictly pursued. *Supreme Ct.*, 1857, Husted *a.* Dakin, *Ante*, 137.
8. A sale of real property on execution, advertised to be had under specified executions in the sheriff's hands, is not to be deemed a sale at the instance of a judgment-creditor, whose execution is delivered to the sheriff after the first publication of the advertisement, and is not specified, although the sale is postponed for more than six weeks after the reception of the junior execution, and such postponement is regularly advertised. *Ib.*
9. Where G. had given to W., his partner, a mortgage on the firm property, and subsequently the interest of W. in the property was sold on execution:

   Held, that, as against W. & G., the purchaser acquired not only W.'s interest as a partner, but also his title under the mortgage. *N. Y. Superior Ct., Sp. T.*, 1858, Willett *a.* Stringer, *Ante*, 152.

Demand before Suit, 2; Executors and Administrators, 12, 15.

EXECUTORS AND ADMINISTRATORS.

1. The order of preference in the granting of letters of administration with the will annexed—stated. *In re*, Ward, 1 *Redf.*, 254; S. C., 6 *N. Y. Leg. Obs.*, 111.
2. The order of preference to a grant of letters of administration in the City of New York—stated. *In re*, Root, 1 *Redf.*, 257.
3. One having priority of right to the administration can only deprive those coming after him of their right by taking letters himself. He cannot nominate a third party to the exclusion of others. *N. Y. Surr. Ct.*, 1847, *In re*, Root, 1 *Redf.*, 257; S. C., 5 *N. Y. Leg. Obs.*, 449.
4. *It seems* that the subsequent marriage of an administratrix is no ground for removing her where her husband files his consent to her continuance in office, and unites with her and the sureties in a new bond. *Kings Surr. Ct.*, 1853, Newhouse *a.* Gale, 1 *Redf.*, 217.
5. One who is the executrix and also a legatee under an alleged will of a later date than that already admitted to probate, has such an interest in the estate of the deceased, pending proceedings on the probate of the paper propounded by her, as entitles her to petition for an order compelling the executrix of the will already admitted, to give security or be superseded. *N. Y. Surr. Ct.*, 1863, Cunningham *a.* Souza, 1 *Redf.*, 462.
6. The "due administration of the estate" for which the executor gives security, consists in paying its obligations, and handing over the balance to the persons entitled. *Ib.*
7. An appeal from a surrogate's decree declaring a will null and void, stays all proceedings on letters of administration subsequently granted, and no letters of collection can be issued upon them while the letters continue in force.

   Held, therefore, that the letters of administration must be revoked in order to enable letters of collection for the probation of the personal property pending the appeal. *Kings Surr. Ct.*, 1853, Needhouse *a.* Gale, 1 *Redf.*, 217.
8. A legatee and executor named in a will which has been declared null and void by a decree of the surrogate, and who has appealed from such decree, has sufficient interest in the estate to enable him to apply for the removal of the administratrix. *Ib.*
9. On the application of a special collector, for the sale of certain personal property alleged to belong to the estate, but claimed to be owned by the widow who contested the will:

   Held, 1. That without trying the absolute title of the property, the

surrogate must determine the *probable* ownership, and that without resorting for evidence of the title to the paper propounded as decedent's will.

2. Although the probable title was in the estate, yet the surrogate would not order a sale of property which was not actually in the hands of the representative of the estate; but would direct the collector to bring suit to test the title. *N. Y. Surr. Ct.*, 1863, Libby *a.* Christy, 1 *Redf.*, 465.

10. On an application that the executors file an inventory and give security, a motion for an order that the executors deposit the books of a copartnership composed of the deceased and one of the executors, so as to enable the next of kin to ascertain the interest of the deceased in such copartnership, will be denied. *Kings Surr. Ct.*, 1853, Waring *a.* Waring, 1 *Redf.*, 205.

11. A receiver of the "debts, property, equitable interests," &c., of the executors appointed in supplementary proceedings, has not such an interest in the estate of the deceased as entitles him to an accounting by the judgment-debtor, as executor. *N. Y. Surr. Ct.*, 1862, Worrall *a.* Driggs, 1 *Redf.*, 449.

12. Under 2 Rev. Stat., 116, § 20,—authorizing the surrogate to require an accounting from an executor against whom judgment has been rendered, after a trial at law upon the merits, and, if assets properly applicable to the judgment are disclosed, to direct an execution to issue, —the surrogate has not power to order an execution, where the debts of the deceased exceed the assets, in such a case as to give a preference to a debt which is not by the statute entitled to such preference. *Supreme Ct.*, 1864, Mitchell *a.* Mount, *Ante*, 265.

13. Though it appears on the accounting by an administrator, that the assets of the estate are not sufficient to satisfy in full all the debts of the estate, yet it appearing that there are sufficient to satisfy a judgment obtained against the administrator for legal services rendered in the administration, and to pay all other probable expenses of the administration, a decree will be granted that the administrator pay out of the estate the amount of the judgment, with interest and costs. *N. Y. Surr. Ct.*, 1863, Cowles *a.* Thompson, 1 *Redf.*, 490; affirmed, *Ib.*, 493.

14. In order to make the judgment a "debt" within the meaning of the statute, so that it must abate with the other debts due from the estate, in consequence of the deficiency of assets, it would be necessary that the services for which the judgment was obtained, should have been rendered to the testator in his life time. *Ib.*

15. *It seems*, that if the creditor should so require, the surrogate may proceed further, and direct that an execution issue. *Ib.*

16. After the expiration of eighteen months from the granting of letters testamentary or of administration, the surrogate, upon the petition of any creditor, legatee, or next of kin, or upon his own motion, may require the executor or administrator to file an account of his proceedings. *Superior Ct.*, 1863, Woodruff *a.* Woodruff, *Ante*, 165.

17. A sole acting executor may be required to do so at the instance of a legatee, though the latter is also executrix. *Ib.*

18. On an accounting before the surrogate, the executor or administrator may be required to disclose the assets of a partnership of which himself and the deceased were members at the time of the death of the latter, although the interest of the deceased in the firm is entirely unliqnidated. *Ib.*

19. In this respect there is no difference in the authority of the surrogate on an intermediate accounting, under 2 Rev. Stat., 92, § 52, and on a final accounting. *Ib.*

20. The account of proceedings required of an executor or administrator, must be such an account as, when rendered, may be finally settled. *N. Y. Surr. Ct.*, 1846, *In re*, Jones, 1 *Redf.*, 263; S. C., 5 *N. Y. Leg. Obs.*, 124.

21. Requisites of such an account—stated. *Ib.*

22. An assignee of the distributive share of one of the next of kin, having neglected to bring an action on the assignment, cannot afterwards ask the surrogate to try its validity on the accounting of the administrator. *Supreme Ct.*, 1863, Decker *a.* Morton, 1 *Redf.*, 477.

23. Only those claims against the estate of a deceased person are referable, under 2 Rev. Stat., 90, which accrued during his life, or would have accrued against him if he had lived. *Supreme Ct., VI. Dist., Sp. T.*, 1864, Godding *a.* Porter, *Ante*, 374.

24. Where a testator, in his will, gave to his widow as much as she would need for support,—*Held*, that an account against the estate for support furnished by a third person was not referable under the statute. *Ib.*

25. Where, upon a motion to confirm the report of a referee on a claim against the estate of a deceased person, referred, under the statute, the moving papers show incontrovertibly a claim of a nature not referable, the defendant may oppose the motion to confirm the report of the referee without making a case. *Ib.*

26. On denying the motion to confirm, costs will not be given, for the reference was by the defendant's consent. *Ib.*

27. And the court will not order the report to be set aside, for the plaintiff may desire to test its validity as an award. *Ib.*

28. The recovery of judgment against an executor or administrator for a debt of the deceased, creates no preference. The fact that the suit was commenced against the deceased in his lifetime, does not alter the rule. *Supreme Ct.*, 1864, Mitchell *a.* Mount, *Ante*, 265.
29. On an application by administrators for authority to sell the real estate of the deceased to pay his debts, it is competent for a devisee of the real estate in question, or any person claiming under him, to contest the validity of a judgment obtained against the administrators, like any other claim or demand against the estate. *Madison Surr. Ct.*, 1859, Colson *a.* Brainard, 1 *Redf.*, 324.
30. The devisee being let in to contest the judgment, it was ordered that it be sent to the circuit on an order for a trial, under section 72 of the Code. *Ib.*
31. Where two executors or administrators take an obligation to themselves jointly as representatives of their testator, for a debt belonging to his estate, one of them can receive payment and lawfully discharge the obligation. *Ct. of Appeals*, 1864, People *on rel.* Eagle *a.* Keyser, *Ante*, 214.
32. The same rule applies in the case of an obligation in favor of partners, and a release by one is a discharge of the obligation. *Ib.*
33. An action will not lie by an executor and executrix against a co-executrix and her husband to recover damages for the alleged wrongful conversion by the latter of certain chattels and choses in action of the testator in his lifetime. *So held*, on demurrer. *Supreme Ct., VII. Dist.*, 1862, Whitney *a.* Coapman, 39 *Barb.*, 482.
34. Nor does the fact that one of the plaintiffs is a legatee vary the question. A legatee, as such, has no right of action in such a case. *Ib.*
35. The proper remedy is to require the husband of the executrix to account as an executor. *Ib.*

CONTEMPT; COSTS, 1, 2; EXECUTION, 1, 2; SURROGATES' COURTS.

FALSE IMPRISONMENT.

1. Actions for false imprisonment and for malicious prosecution—distinguished, and the rules governing the pleadings and evidence in each, stated. Brown *a.* Chadsey, 39 *Barb.*, 253, 260.
2. Where a private person takes any part in an unlawful imprisonment of another, he becomes a principal in the act, and is liable for the trespass; but where he merely communicates facts or circumstances of suspicion to officers, leaving them to act upon them on their own judgment

and responsibility, he is not liable. [T. C. & P. 373.] *Supreme Ct., II. Dist.*, 1863, Brown *a.* Chadsey, 39 *Barb.*, 353.

3. The Metropolitan police act allows the officers of police to arrest persons suspected by them, without warrant, where there is reason to believe a felony has been committed; and a private person on whose information an arrest is made, but who merely disclosed what he knew, and only expressed an opinion that there was enough of suspicion against the defendant to have an examination, and did not request or urge any arrest, but left it to the officer at the station house to decide on its propriety, is not liable to an action of false imprisonment. *N. Y. Superior Ct.*, 1864, Burns *a.* Erben, 26 *How. Pr.*, 273.
4. A person who has, without bad faith, upon oath or otherwise, merely stated his case to a magistrate having jurisdiction of the offence supposed to have been committed, and of the person accused, is not liable to an action for false imprisonment upon the consequent arrest of the accused, although such arrest is not warranted by the law or the facts in the case. *Supreme Ct.*, 1862, Von Latham *a.* Rowan, *Ante*, 237.

DAMAGES, 4; EVIDENCE, 74; TRIAL, 18, 19.

FORECLOSURE.

1. Where a mortgage is given to secure payment of a bond, an assignee suing to foreclose the mortgage must show an assignment to him of the bond, as well as of the mortgage. *Supreme Ct., VII. Dist.*, 1863, Cooper *a.* Newland, *Ante*, 342.
2. A purchaser at a sale under a judgment of foreclosure, having deposited the 10 per cent. with the referee, if he fails to complete, and a second sale is made for a much less sum, the percentage so paid into court will be applied towards the payment of such deficiency. *Supreme Ct., II. Dist., Sp. T.*, Willets *a.* Van Alst, 26 *How. Pr.*, 225.
3. Where one claiming under such defaulting purchaser as the owner of the bid, becomes the owner of the judgment and obtains an order in the cause giving him the right to complete the purchase, but fails to do so to the prejudice of a subsequent incumbrancer, the court, at special term has no power to postpone the payment of the judgment out of the proceeds, and to apply the moneys, in the first instance, to the satisfaction of subsequent liens. *Ib.*

FOREIGN CORPORATION.

No power can be exercised by the Supreme Court, over a foreign corporation, in proceedings commenced by a stockholder, to wind up its affairs; though for the purpose of preserving its property, the court has

ample power to take charge of it and to appoint a receiver. [1 Paige, 587.] *Supreme Ct., I. Dist., Sp. T.*, 1863, Murray *a.* Vanderbilt, 39 *Barb.*, 140.

SERVICE (and proof of) 2.

FORMER ADJUDICATION.

1. A former adjudication, as a bar, is limited to questions in issue, or which the claimant was bound to raise therein, and to persons legally before the court. *Supreme Ct.*, 1864, Mathews *a.* Duryee, *Ante*, 256.
2. A purchaser of goods is not precluded from maintaining an action for a breach of warranty in regard to them, by the fact that he has suffered judgment by default in an action brought to recover the price. *Supreme Ct., I. Dist.*, 1864, Barth *a.* Burt, *Ante*, 349.
3. A former judgment is a bar, not to all claims which might have been litigated therein, but only as to such matters as might have been litigated under the pleadings and issues as made. *Ib.*
4. A mortgagor having brought an action to cancel the mortgage on the ground that it was paid to the defendant, the holder of the mortgage alleged a large sum to be due, and on a trial the referees found that it was not paid, but that a specified sum was due; and the complaint was accordingly dismissed:

   Held, that the judgment was conclusive only as to the question of entire payment, and not as to the amount due. *Supreme Ct., III. Dist.*, 1861, Campbell *a.* Consalus, 40 *Barb.*, 509. See a further decision, 25 *N. Y.*, 613.

DEFENCES, 2–6; DIVORCE, 7.

FRAUD.

EVIDENCE, 6, 23, 24, 67, 68, 78.

GUARDIAN AD LITEM.

1. A guardian *ad litem* cannot, of his own mere motion, make an absolute settlement of the whole matter in controversy so as to bind the infant. The only source of his power is the court. The authority conferred upon him is to prosecute, not to settle. *Supreme Ct., VI. Dist.*, 1863, Edsall *a.* Vandemark, 39 *Barb.*, 589.
2. Infants cannot sustain an action for partition without leave, and the appointment of guardian *ad litem*, pursuant to the act of 1852. (*Laws of* 1852, 411, ch. 277.) If they proceed by procuring merely a guar-

dian to be appointed under the provisions of the Code of Procedure as in ordinary actions, their suit should be dismissed, but without costs, against them. *Supreme Ct., IV. Dist., Sp. T.*, 1863, Lansing *a.* Gulick, 26 *How. Pr.*, 250.

GUARDIAN AND WARD.

1. Of the power of the husband to appoint a testamentary guardian, and of the right of the wife as guardian. People *a.* Boice, 39 *Barb.*, 307.
2. The guardian or committee of a lunatic appointed in proceedings instituted in another State, where both the lunatic and guardian reside, will not be recognized by our courts, on an application by the guardian for property belonging to the lunatic in this State. In the absence of statutory authority, other States will not recognize the artificial character thus created. [7 Johns. Ch., 45; Story on Confl. of L., 424.] *Supreme Ct., VIII. Dist., Sp. T.*, 1864, Matter of Neally, 26 *How. Pr.*, 402.
3. The proper course is to procure the appointment of the guardian or committee under proceedings instituted here, to ascertain the fact of lunacy. [8 How. Pr., 220.] *Ib.*
4. The compensation of a guardian is not confined to the commissions allowed him by statute. Generally in the cases in which extra compensation has been denied, the services for which remuneration has been asked were strictly within the official duties of the executor, guardian, or trustee, and no other recompense was allowed than such as the statute provides; and the rule is not so narrow and restricted that it denies all compensation to a guardian for services of a personal or professional character rendered by him for the benefit of his ward, and in doing which he has bestowed personal labor and incurred actual expenses, and which have been useful and serviceable to the estate. *Supreme Ct., V. Dist.*, 1863, Morgan *a.* Morgan, 39 *Barb.*, 20.
5. Thus a mechanic who renders his services as such in the repair and preservation of the property as to which he is guardian may be allowed a compensation for such services. *Ib.*
6. Where a guardian received instructions from the surrogate in regard to the manner in which certain property of the estate should be repaired, how the account should be kept and the amount of his compensation, and from year to year the account was rendered to the surrogate, examined, and the amount fixed and allowed by him; *it seems*, that such account is conclusive upon his successor, and cannot be again opened and readjusted. *Ib.*

HABEAS CORPUS.

JURISDICTION, 1–3.

HIGHWAYS.

1. Commissioners of highways are entitled to claim from an overseer, before his annual accounting, the commutation-money received by him from a corporation, whose principal office is not situated in their town. *Supreme Ct.*, 1863, Fowler *a.* Westervelt, *Ante*, 59.
2. *It seems*, that the rule is otherwise as regards money received from lands assessed as the property of non-residents. *Ib.*
3. An assessment of damages caused by laying out a highway, by commissioners appointed by the county court (2 *Rev. Stat.*, 5 ed., 397, § 83), is not annulled or invalidated by applying for a jury under section 85, to re-assess such damages; nor is the original assessment affected, where the proceedings to re-assess the damages are discontinued, or the jury fail to agree. The award of the commissioners is in effect a judgment in favor of the owners of the land against the town, and is final and conclusive until reversed on *certiorari* or vacated by a re-assessment actually made. *Supreme Ct., V. Dist.*, 1863, People *on rel.* Lumley *a.* Lewis, 26 *How. Pr.*, 377.
4. Where the jury fail to agree on a re-assessment of such damages, a new jury may be summoned and impanneled, before whom the same proceedings shall be had for such re-assessment, as might have been had before the first jury. *Ib.*
5. Where no proceedings were taken for eleven months to call out a new jury after the first failed to agree, *held* that the party applying for such re-assessment, had abandoned the same. *Ib.*
6. Where the commissioners of highways of two adjoining towns, in different counties, assemble together in joint board, and unite in an order laying out or refusing to lay out, altering or discontinuing, or refusing to alter or discontinue, a road or highway, their judgment and determination cannot be reviewed by appeal to a county judge of one of the counties. *Supreme Ct., II. Dist.*, 1863, People *on rel.* Clarkson *a.* Nelson, 26 *How. Pr.*, 346.
7. *It seems*, that in the absence of any provision of the statute for review in such a case, the determination of the joint board of commissioners must be considered final, and equivalent in all respects to an order of one board of commissioners affirmed by three referees on appeal. *Ib.*

IMPRISONED DEBTOR.

A person charged in execution and held in custody by virtue of it, although not within the walls of the jail building, but on the limits, is a person "imprisoned," within the meaning of 2 Rev. Stat., 31, art. 6, which provides for the discharge of persons so imprisoned and prescribes the proceedings preliminary to such discharge. *N. Y. Superior Ct.*, 1863, Cowan *a.* Storm, 26 *How. Pr.*, 84.

PARTIES, 8; SERVICE AND PROOF, 1.

INDICTMENT.

Where a prisoner had been convicted of manslaughter by a jury, under an indictment charging a wounding on the 6th February, and a death on the 14th February, and that, "on the day and year aforesaid," the prisoner did kill, &c.;—*Held*, that the prisoner could not take advantage of the uncertainty in the indictment as to time. *Supreme Ct., I. Dist.*, 1864, Reynolds *a.* People, *Ante*, 413.

INFANTS.

1. The Supreme Court of this State, like the former Court of Chancery, exercises a general control over all minors. *Supreme Ct., I. Dist.*, 1864, People *on rel.* Johnson *a* Erbert, *Ante*, 395.
2. This power is for the benefit of the child, and is not to be defeated by one having a mere legal title to the custody of the child, whether that title or right arise from a natural relationship or from an act of law. *Ib.* See, also, People *on rel.* Neidlinger *a.* Lohman, *Ib.*, *note*; Matter of Lesslier, *Ib.*, 397, *note*; Matter of McKain, *Ib.*, 399, *note*.

GUARDIAN AD LITEM, 2; GUARDIAN AND WARD.

INJUNCTION.

1. Where a bridge company leased a bridge to a railroad company upon conditions restricting the lessee's use, and reserving some tolls to the lessor,—*Held*, that under the circumstances an injunction would lie to prevent violations of these conditions. *Supreme Ct., VIII. Dist.*, 1863, Niagara Falls International Bridge Co. *a.* Great Western R. R. Co., 39 *Barb.*, 212.
2. Notwithstanding the right to sue at law for damages, a suit in equity may be maintained for an injunction to restrain the defendants from diverting a water course and for a judgment compelling the defendants

to restore the waters to their natural bed or channel. [6 Johns. Ch. 497; 2 Code R., 100; 6 How. Pr., 89; 3 Sumn., 183.] *Supreme Ct., III. Dist.*, 1862, Corning *a.* Troy Iron & Nail Co., 39 *Barb.*, 311.

3. Special damages need not be averred, in order to entitle the plaintiff to an injunction, in such case. *Ib.*
4. The court will not interfere by injunction to restrain the collection of a tax imposed upon an individual in respect of his personal property, upon allegations that it has been illegally imposed. An action will not lie for such a purpose. *N. Y. Superior Ct.*, 1861, The Mutual Benefit Life Ins. Co. *a.* The Board of Supervisors, 8 *Bosw.*, 667.
5. Although the court, by having jurisdiction over the person of the defendant, may compel specific performance of a contract in relation to lands situate in another State, still the granting of a preliminary injunction, is a matter of discretion. And where the plaintiff has ample remedies for the preservation and enforcement of all his rights in the courts of another State, where the land lies, or in the Courts of the United States, it is not sound discretion to aid by injunction in drawing within the jurisdiction of our courts the decision of those questions which can more appropriately be investigated and determined elsewhere. *Supreme Ct., I. Dist., Sp. T.*, 1864, Mariposa Co. *a.* Garrison, 26 *How. Pr.*, 448.
6. An injunction will not, ordinarily, be granted to prevent acts, the commission of which is not alleged to be apprehended. *Ib.*
7. The courts of this State will not grant an injunction to restrain an action pending in the United States Court. *Ib.*
8. Where the plaintiff's rights in certain property must be determined by the construction to be given to written instruments which are recorded, an injunction to prevent a transfer of the property by the defendant to a *bona fide* purchaser, should not be granted; for any purchaser would take with notice of the instruments, and be bound by them the same as the defendant is. *Ib.*

JURISDICTION, 4.

INQUEST.

1. An inquest should be set aside, unless the court can be fully satisfied that the defendant had no evidence which would materially reduce or defeat the recovery. *Supreme Ct.*, 1863, Leighton *a.* Wood, *Ante*, 177.
2. On granting a motion to open an inquest, not on the ground of irregularity, but as a matter of favor, upon defendant's showing that he has

a defence, the terms to be imposed should be payment of the costs of the term, of the inquest, and of opposing the motion to set it aside. *Ib.*

INSURANCE.

Misrepresentations as to the pecuniary condition of an applicant for a life insurance, made to the medical examiner selected by the insurers, do not invalidate the policy. *Supreme Ct.*, 1863, Valton *a.* National Loan Fund Life Assurance Society, *Ante*, 268.

LIMITATIONS OF ACTIONS, 5, 6.

INTEREST.

Where a widow demanded dower in surplus moneys received by her husband's assignee, the latter making no objection to the form or extent of the demand,—*Held*, that a refusal of the demand subjected the assignee to a liability for interest on the amount to which the doweress was entitled. *Supreme Ct.*, 1864, Mathews *a.* Duryee, *Ante*, 256.

JUDGMENT, 14.

INTERPLEADER.

1. Interpleader is allowed only to those who are in danger of loss by an inability to determine to whom the money or property in question belongs. *Supreme Ct., I. Dist*, 1864, Trigg *a.* Hitz, *Ante*, 436.
2. To sustain an action of interpleader, it must appear that the plaintiff is ignorant of the rights of the respective claimants; nor can he assert such ignorance where his liability to one of the parties rests upon an estoppel. *Ib.*
3. Thus, where a *bona-fide* purchaser of merchandise brought an action of interpleader against his vendor, and a previous owner, who claimed to have been defrauded of the goods by the vendor, and also against the indorsee of a check given for part of the purchase-money, and the assignee of the remainder;—*Held*, that the action could not be maintained. *Ib.*
4. An action of interpleader cannot be maintained by the buyer of goods to settle the conflicting demands of his vendor, and a stranger, who claims the purchase-money on the ground that the vendor had obtained the property from him by fraud. *Ib.*
5. The usual order allowing a defendant to pay the demand into court, and substituting another party in his place, is not imperative, and the

defendant who applied for it may, instead of taking advantage of it, put in an answer in the cause. *Supreme Ct., I. Dist., Chambers*, 1861, Neill *a.* Wuest, *Ante*, 319, *note.*

ISSUES.

EXECUTORS AND ADMINISTRATORS, 30.

JOINDER OF ACTIONS.

A claim for an absolute divorce cannot be tried in the same action with a claim for a limited divorce. *N. Y. Superior Ct., Chambers*, 1864, Henry *a.* Henry, *Ante*, 411.

JUDGMENT.

1. Where the defendant dies before expiration of his time to answer, the court has no power to enter judgment against him. And a judgment so entered will be set aside on motion, even after the expiration of a year from the date of entry. *Supreme Ct., Chambers*, 1863, Borsdorff *a.* Dayton, *Ante*, 36, *note.*
2. Although, under section 311 of the Code of Procedure,—which provides for insertion of costs in judgments,—the judgment be entered before the adjustment of costs, failure to comply with this rule is not sufficient to justify setting aside a judgment otherwise regular. *N. Y. Superior Ct., Chambers*, 1860, Macomber *a.* Mayor, &c., of N. Y., *Ante*, 35.
3. A judgment-roll, on failure to answer, must contain proof of due and timely service of the summons. *Ib.*
4. Where the plaintiff's attorney, on being informed by the defendant that the answer served by his attorney was not his, and that he had never sworn to it, entered judgment as upon failure to answer;—*Held*, that such judgment was irregular. The remedy was by motion to strike out the answer. *Supreme Ct., I. Dist., Sp. T.*, 1863, Chadwick *a.* Snediker, 26 *How. Pr.*, 60.
5. In a judgment entered upon a decision by the court after trial, it is sufficient to refer to the decision without reciting its particulars, and recitals of particulars in which the decision is erroneous may be struck out upon an appeal from the judgment, where the errors are such as to be cured by the prevailing party consenting to reduce the recovery. *N. Y. Superior Ct.*, 1861, Bunten *a.* Orient Mutual Ins. Co., 8 *Bosw.*, 446.
6. In an action to recover the possession of specific personal property, if

the plaintiff does not resort to proceedings of claim and delivery, or if after he has resorted to such proceedings, the defendant reclaims the goods by giving bond and retains possession of them, the jury, in assessing the value of the property upon the trial, should find the value of the property at the time of the verdict, and its depreciation since the time of the taking, from any causes proven by the evidence. Interest should be allowed on the whole amount. The amount of depreciation and the interest will form the damages; and the judgment will be for the recovery of possession and the sum found for damages, or, if delivery cannot be had, for the amount of the value at the time of the verdict, and the damages. *N. Y. Superior Ct.*, 1861, Young *a.* Willett, 8 *Bosw.*, 486.

7. Where, however, in such a case, the jury found the value at the time of the taking, which exceeded the value alleged in the complaint, and also found the depreciation and the interest, and the plaintiff, by consenting to a reduction of the verdict, had procured judgment to be entered in a form which produced the same result as if the verdict had been in accordance with the rule above stated;—*Held*, that the judgment must be affirmed. *Ib.*

8. *It seems*, that in an action of an equitable nature, upon an agreement to insure, it is not necessary, in order to plaintiff's recovery, to adjudge that a policy be issued by defendants. Bunten *a.* Orient Mutual Ins. Co., 8 *Bosw.*, 448.

9. The plaintiff sued as the grantee of certain land, to obtain a judgment declaring a mortgage upon it paid and satisfied; and also as assignee of certain claims against the defendant, to have judgment upon them, and to apply the judgment in satisfaction of the mortgage. The complaint contained a prayer for general relief, but no prayer for permission to *redeem* the mortgage.

Held, that as the facts embraced in the pleadings and proved on the trial, presented a fit case for such relief, if desired, and as the claim for such relief was distinctly made at the close of the case, and was susceptible of being granted under the allegations and proofs, and under the clause for general relief, the judgment should have provided for it by declaring the amount due on the mortgage, and that upon its payment the mortgage should be cancelled. [16 N. Y., 519; 4 Id., 253; 12 Ib., 336; 20 Ib., 62.] *Supreme Ct., III. Dist.*, 1863, Beach *a.* Cooke, 39 *Barb.*, 360.

10. In an action brought to charge the separate estate of a married woman, a judgment charging her separate estate with a debt, and providing for the sale of the property, is, on a motion in the same court, conclusive evidence that the contract, on which the action is

brought, is not valid at law, but enforceable only in equity. *Supreme Ct., VII. Dist., Sp. T.*, 1862, Charles *a.* Lowenstein, 26 *How. Pr.*, 29.

11. A judgment dismissing the complaint on the ground that the plaintiff has not legal capacity to sue, although erroneous in this respect, will not be reversed, if the dismissal should be sustained on other grounds. *N. Y. Superior Ct.*, 1863, Robbins *a.* Wells, 26 *How. Pr.*, 15.

12. A judgment against a married woman upon a contract, not valid in law, but which will be enforced in equity, should be directed only against her separate property; and for the purpose of carrying the judgment into effect, a receiver should be appointed. *Supreme Ct., VII. Dist., Sp. T.*, 1862, Charles *a.* Lowenstein, 26 *How. Pr.*, 29.

13. Form of judgment framed to reach the separate estate of a married woman, in an action of an equitable nature. *Ib.*

14. Every judgment bears interest from the time of perfecting it. *N. Y. Com Pl.*, 1863, Johnson *a.* Tuttle, *Ante*, 315.

15. All judgments entered in the office of the county clerk out of office hours become a lien upon real estate, only from the subsequent legal commencement of office hours, and no priority of lien is created by priority of time in filing judgment-rolls out of office hours. *Supreme Ct., III. Dist.*, 1862, France *a.* Hamilton, 26 *How. Pr.*, 180.

16. Under section 174 of the Code of Procedure,—which provides for relief in cases of mistake,—the court have power, at any time within one year, to relieve against a judgment suffered by mistake, surprise, inadvertence, or excusable neglect. *N. Y. Superior Ct., Chambers*, 1860, Macomber *a.* Mayor, &c., of N. Y., *Ante*, 35.

17. A judgment may properly be satisfied of record by an order of the court, although such judgment has been previously discharged of record by filing a satisfaction-piece, where such satisfaction-piece was given conditionally, and not in full discharge of the demand. *Supreme Ct.*, 1863, Ward *a.* Beebe, *Ante*, 1.

18. *It seems*, that it is the duty of the county clerk to satisfy of record a judgment in favor of several, on receiving a satisfaction-piece executed by one only of the judgment-creditors. *Ct. of Appeals*, 1864, People *on rel.* Eagle *a.* Keyser, *Ante*, 214.

19. In an application by the comptroller of New York to set aside a judgment by default against that city, entered upon a voluntary appearance without proof of timely service of the summons, the merits of the action being doubtful;—*Held*, that the want of proof of service of summons entitled the defendant to have the judgment vacated, and that defendants should be allowed to plead or answer without terms.

N. Y. Superior Ct., Chambers, 1860, Macomber *a.* Mayor, &c., of N. Y., *Ante*, 35.

20. *It seems*, that the fifth section of Laws of 1859, 1127, ch. 489,—allowing the comptroller of the city of New York to take measures, in the name of the city, to reverse or modify judgments against the latter, which he has reason to believe were obtained by collusion or fraud,—is not unconstitutional. *N. Y. Superior Ct., Chambers*, 1860, Macomber *a.* Mayor, &c., of N. Y., *Ante*, 35, *note.*

21. A judgment suffered to stand as security on setting aside a default, does not determine any right of the parties in the action, but exists merely as a security. *N. Y. Superior Ct.*, 1861, Mott *a.* The Union Bank, 8 *Bosw.*, 591.

22. *It seems*, that after judgment has been vacated with the reservation that it is to stand as security for any final recovery in the cause, if the plaintiff succeeds, he may enter a new judgment for his recovery, notwithstanding the fact that the first judgment still remains upon the record. *Ib.*

CONFESSION OF JUDGMENT; DEFAULT, 2, 3; DIVORCE, 7–10; EVIDENCE, 26–28; EXECUTION, 2, 14, 28, 29; FORMER ADJUDICATION; JUDICIAL SALE, 2; LEAVE TO SUE; REDEMPTION; SUPPLEMENTARY PROCEEDINGS, 5.

JUDICIAL SALE.

1. To sell together, on execution, land consisting of distinct parcels, is an irregularity merely. *Supreme Ct.*, 1857, Husted *a.* Dakin, *Ante*, 137.

2. By a sale of land on a judgment, the lien of the judgment, and the right to redeem under it, are extinguished. *Supreme Ct., Sp. T.*, 1857, Husted *a.* Dakin, *Ante*, 137.

3. In like manner, any claim upon surplus moneys arising upon the foreclosure of a prior mortgage is extinguished by such a sale. *Ib.*

4. A sale by a referee, executing a judgment of the court in an action of foreclosure, is not to be regarded as a contract, and is not within that section of the statute of frauds, requiring contracts of sale to be subscribed by the seller of the land. It is true that such sales are within the provision that no estate or interest in lands will pass without deed or conveyance. [2 Cai., 61; 2 Johns., 248.] But the reasons upon which this conclusion is rested are drawn from the manifest public inconvenience and great uncertainty as to titles which would result from allowing the sale itself and the return indorsed on the execution to constitute sufficient evidence of title; and they will not sustain a conclusion that the contract of sale is void because the sheriff omits to

subscribe a memorandum of it, as none of these evils could result from such an omission. The transaction between a referee, executing the judgment of the court by a sale in an action of foreclosure, and the successful bidder, cannot strictly be regarded as a contract. The referee, acting only as the minister of the court, assumes for himself no obligation to complete the sale, and can impose none upon the court which he represents. It is always within the power and often becomes the duty of the court to set aside these sales, and this is entirely inconsistent with the idea that they are contracts of the court, for a contract is an act which contains a perfect obligation which cannot be annulled at the pleasure of the party bound by it. Moreover, a court has no such legal entity as capacitates it to make a contract, for it is neither a person nor a corporation—can neither sue nor be sued. *Supreme Ct., II. Dist., Sp. T.*, Willets *a.* Van Alst, 26 *How. Pr.*, 325.

5. Hence, a purchaser who makes default cannot reclaim his deposit upon the ground that the sale was void. *Ib.*
6. Though in a sale and conveyance by a trustee, of the trust property, the trustee may have acted from the best of motives, and the sale may have been fairly conducted, and the price obtained, full and ample, yet the courts will open the sale and order a resale, if the parties—the *cestuis que trust*—are not satisfied with it, and they make their claim and bring their action within a reasonable time. [2 Johns. Ch., 251; 5 Ves., 678; 13 Ib., 600.] *Supreme Ct., II. Dist.*, 1863, Johnson *a.* Bennett, 39 *Barb.*, 237.
7. A judgment vacating a sale of that kind will be upon terms, in regard to the purchase-money already paid and perhaps distributed, in execution of the trusts, so as to insure justice and equity to all concerned. *Ib.*

EXECUTION, 7, 8; REDEMPTION, 3.

JURISDICTION.

1. Judges of the State courts have not power to issue a writ of habeas corpus, or to continue proceedings under it, when issued, in cases of commitment or detainer under the authority of the United States. [5 Dutch., 409; 7 Cush., 285; 1 Johns. Cas., 136; 9 Johns., 239; 5 McLean, 92; 21 How. U. S., 506.] *Supreme Ct., Chambers*, 1863, Matter of Hopson, 40 *Barb.*, 34.
2. A return to a writ of habeas corpus, that the respondent was a provost marshal, duly appointed under an act of Congress; that the person alleged to be illegally retained, had been arrested and was held by

him, as such marshal, as a deserter from the army; and that he was held under the authority of the United States;—*Held*, sufficient in law; and the respondent was not bound to produce the body of the prisoner before the justice. *Ib.*

3. The proper remedy for the prisoner is to apply to a judge of the United States courts for a writ of habeas corpus, to ascertain whether he is detained by an illegal or colorable authority, by an officer claiming to act under the laws of the United States. *Ib.*
4. The State courts have jurisdiction to interfere by injunction in favor of the discoverer or inventor of an improvement or device, even though patentable, against a person who is about to divulge the secret, in violation of his agreement with the plaintiff. *Supreme Ct., I. Dist., Sp. T.*, 1863, Hammer *a.* Barnes, 26 *How. Pr.*, 174.
5. A controversy which is clearly one of legal cognizance, will never be the subject of equitable jurisdiction, unless facts are stated to show that a perfect remedy cannot be obtained at law. *Supreme Ct., I. Dist., Sp. T.*, 1863, Mad. Ave. Baptist Church *a.* Mad. Ave. Baptist Church, 26 *How. Pr.*, 72.
6. The Supreme Court had jurisdiction of an action for the foreclosure of a mortgage where the amount due was less than one hundred dollars, even prior to the enactment of the Laws of 1862, ch. 460, § 39, which repealed the provision of the Revised Statutes, denying jurisdiction to the Court of Chancery in such cases. *Ct. of Appeals*, 1863, Braman *a.* Johnson, 26 *How. Pr.*, 27.
7. Jurisdiction in actions commenced by publication of summons is strictly statutory, and can be acquired only in the mode prescribed by the statute. *Supreme Ct.*, 1863, Wortman *a.* Wortman, *Ante*, 66.

EVIDENCE, 4; JUSTICES' COURTS, 1, 4.

JURY.

HIGHWAYS, 4; TRIAL, 1–8.

JUSTICES' COURTS.

1. A justice of the peace has jurisdiction to receive a confession of judgment at the defendant's house, in the town of the justice's residence. *Supreme Ct., V. Dist.*, 1863, Stone *a.* Williams, 40 *Barb.*, 322.
2. The absence or presence of the justice's docket at the time and place of receiving the confession of judgment, will not affect his jurisdiction, where the defendant actually appeared before him, and signed it in his presence. *Ib.*

3. Previous to the amendment of section 53 of the Code of 1862, justices of the peace had no jurisdiction of actions on the case for fraud in obtaining a judgment. *Supreme Ct., IV. Dist.*, 1863, Farrington *a.* Bullard, 40 *Barb.*, 512.
4. An action upon a promise to discontinue a suit, is to be deemed an action on a contract, of which a justice of the peace has jurisdiction; notwithstanding an averment in the complaint that the defendant falsely and fraudulently promised the plaintiff that he would discontinue the action. *Ib.*
5. Where, in an action for a *tort*, in wrongfully taking and converting plaintiff's property, there is an entire failure to show that it was wrongful or tortious, or that there was any fraudulent intent, there should be a nonsuit; and the plaintiff cannot, at the close of the case, waive the *tort*, and recover as upon a contract. [16 N. Y., 250; 21 How. Pr., 289; 5 Duer, 389.] *Supreme Ct., VI. Dist.*, 1862, Ransom *a.* Wetmore, 39 *Barb.*, 104.
6. In a cause tried in a justice's court, the defendant, after the testimony was closed, moved for a nonsuit, which was denied; and plaintiff asked leave to amend and change the form of his action from tort to assumpsit, to which defendant objected, and the objection was sustained.

   Held, that the defendant, by objecting at that stage of the case, to so important and material a change, did not waive his rights already acquired by his motion for a nonsuit. His refusal to assent to such an amendment, could not be regarded as in any way affecting the question presented on the motion for a nonsuit. *Supreme Ct.*, 1862, Ransom *a.* Wetmore, 39 *Barb.*, 104.
7. Where a new trial is had in the County Court on appeal from a justice's judgment, upon an issue of fact, under section 366 of the Code, the parties are restricted to proofs under the issue raised in the justice's court. *Supreme Ct., II. Dist.*, 1864, Savage *a.* Cock, *Ante*, 403.
8. Thus, on such a new trial, the County Court have not power to allow the defendant to amend his answer by pleading a new defence. *Ib.*
9. An objection to the form of the complaint, not taken before the justice, cannot be raised before the County Court on the new trial provided for by section 352 of the Code of Procedure. *Supreme Ct.*, 1863, Fowler *a.* Westervelt, *Ante*, 59.
10. Under section 352 of the Code, as amended in 1862,—which gives a new trial in the County Court, upon an appeal from a justice's court, when the amount litigated exceeds fifty dollars,—the new trial in the County Court is a matter of right, not to be withheld for any want of particularity in the statement of the grounds of appeal. *Ib.*

11. Thus, a statement in the notice, that the judgment appealed from was against law and evidence, was *Held*, sufficient to sustain the appeal. *Ib.*

12. A judgment of a justice's court will not be reversed on appeal, on the ground that the justice improperly denied an application for an adjournment of a cause, not giving any reasons for it at the time, unless such error affirmatively appears. It will be inferred, in the absence of anything to the contrary, that the justice openly stated his reasons for refusing the adjournment. *Supreme Ct., III. Dist.*, 1863, Decker *a.* Hassel, 26 *How. Pr.*, 528.

13. The whole of a justice's judgment will not be reversed for an error of the justice in allowing small items of the claim, if the remaining part of the judgment is correct. The appellate court have full power, under the Code, to reverse in part and affirm in part a justice's judgment for entire damages. They do not assume to weigh evidence, or in any manner to decide a question of fact, but whenever a separate distinct item is erroneously allowed by a justice of the peace, there being a total failure of evidence to sustain it, and a correct judgment is given for other matters, it is the duty of the County Court, on appeal, to affirm the judgment in part, and to reverse it in part. If that court fail in its duty, the Supreme Court on appeal, must give the judgment the County Court ought to have given. The power to give such judgment is plainly given to the County Court. [Code of Pro., § 366; 23 How. Pr., 463.] *Ib.*

New York District Courts; Summary Proceedings.

LANDLORD AND TENANT.

1. Buildings and fixtures erected by a tenant become real estate, and are governed by the laws which regulate land descending to the heir as part of the inheritance, or passing by deed as part of the freehold, in all cases except where a right of removal has been reserved, or where the buildings and fixtures were erected for the purposes of trade. *Supreme Ct., I. Dist.*, 1864, Kissam *a.* Barclay, *Ante*, 360.

2. This rule applied against the mortgagees of a tenant, claiming the damages which had been awarded to the owner of the freehold, on a demolition of the building as a street improvement. *Ib.*

3. The failure of the tenant, in such case, to pay rent and perform the covenants of the lease,—*Held*, a bar to the action. *Ib.*

Cause of Action; Evidence, 58–62; Recoupment; Redemption, 1–3.

LEAVE TO SUE.

1. The plain import of section 71, of the Code of Procedure, is, that before bringing an action upon a judgment, leave to prosecute should be obtained from the court in which the judgment was rendered. The language of the section is: "No action shall be brought upon a judgment rendered in any court of this State, without leave of the court for good cause shown, on notice to the adverse party." The court here mentioned, is evidently the one last alluded to, which is the court in which the judgment was rendered. There is obvious propriety in this construction, inasmuch as every court should control its own practice according to law, even to the manner of enforcing its judgment. Perhaps, however, there may be cases when it would be appropriate and necessary to the attainment of justice, to obtain leave to prosecute from the court in which the action on the judgment is brought. *Supreme Ct., IV. Dist.*, 1864, Graham *a.* Scripture, 26 *How. Pr.*, 501.
2. An order for leave to prosecute a judgment rendered in the late court of Common Pleas, may be obtained from the County Court. *Ib.*

LIBEL.

1. To charge a public officer with "black-mailing," and to assert that he has been dismissed for that cause, is calculated to degrade and bring him into disrepute, resulting in injury to his character with the public, and is libellous. *N. Y. Superior Ct.*, 1864, Edsall *a.* Brooks, *Ante*, 221.
2. The defendants published in their newspaper an account of the proceedings before the commissioners of police against the plaintiff, who was a policeman, upon charges that he had improperly received money for services rendered in the performance of his duty, in which proceedings the plaintiff was dismissed by the commissioners, not so much for having received the reward, but for omitting to give notice of it to the commissioners. The defendants prefixed to their report of the proceeding the following title and statement: "BLACK-MAILING BY A POLICEMAN.—Isaac W. Edsall, of the twenty-sixth precinct, City Hall police, has been dismissed from the police department by the commissioners, on charges of black-mail preferred against him by citizens in three distinct cases."

   Held, that these comments were not privileged, but were unfair and untrue deductions from the facts; and for their publication the defendants were liable. *Ib.*

REPORTS.

LIMITATIONS OF ACTIONS.

1. The title of the Revised Statutes, "Of the time of commencing suits in a court of equity" (2 *Rev. Stat.*, 301, §§ 49–53), superseded the whole doctrine of lapse of time, as previously applied in a court of equity, fixing a positive rule for equity suits, just as absolute and definite as the former statutes had prescribed for suits at law. *N. Y. Superior Ct.*, 1860, Fogal *a.* Pirro, *Ante*, 113.
2. The Statute of Limitations does not begin to run against the right of a remainder-man to redeem real estate from the mortgagee in possession under the termor, until the determination of the precedent estate. *Ib.*
3. As against an action of ejectment by the remainder-man, the Statute of Limitations does not begin to run in favor of a person in possession under the termor, till the determination of the precedent estate. *N. Y. Superior Ct.*, 1862, Fogal *a.* Pirro, *Ante*, 113.
4. The same vigilance is required of an administrator or executor, in establishing his claim against the estate of the deceased, as from any other creditor; and one who neglects to take proceedings for more than ten years is barred by the Statute of Limitations. *Kings Surr. Ct.*, 1852, *In re*, Rogers, 1 *Redf.*, 231; S. C., 11 *N. Y. Leg. Obs.*, 245.
5. A cause of action will not accrue upon a premium note until an assessment has been made upon it, and notice thereof given to the maker; and the Statute of Limitations begins to run, therefore, only from the date of such assessment and notice. [2 Rev. Stat., 5 ed., 757, § 44; 19 N. Y., 32; Laws of 1852, ch. 71.] *Supreme Ct., V. Dist.*, 1863, Howland *a.* Cuykendall, 40 *Barb.*, 320.
6. A note given for capital stock of a mutual insurance company, organized under the general law of 1849, and in terms payable in such portions and at such times as required by the company, is, in legal effect, payable on demand, and the Statute of Limitations begins to run from the time it is given. [Following Howland *a.* Edmonds, 24 N. Y., 307.] *Supreme Ct., I. Dist.*, 1863, Colgate *a.* Buckingham, 39 *Barb.*, 177.
7. In cases arising before, as well as since the Code, the defence of the Statute of Limitations can be interposed only by answer. *N. Y. Superior Ct., Sp. T.*, 1860, Fogal *a.* Pirro, *Ante*, 113.
8. *It seems*, that the delivery of a summons to the sheriff with intent that it shall be served, if in fact served within sixty days thereafter, is equivalent to the actual commencement of the action within the meaning of the Statute of Limitations, although the cause of action on which the action is brought accrued before the enactment of the

Code of Procedure. *N. Y. Superior Ct.*, 1861, Davis *a.* Duffie, 8 *Bosw.*, 617.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, a stipulation identifying certain affidavits as the originals upon which a warrant for the arrest of the plaintiff was issued, and admitting that the plaintiff was arrested upon such warrant, does not authorize the defendant to read such affidavits in evidence. *Supreme Ct.*, 1864, Hankinson *a.* Giles, *Ante*, 251.
2. *So held*, where the stipulation, though produced on the trial by plaintiff, was signed by defendant's attorney only. *Ib.*
3. Nor is the case altered by plaintiff's first reading in evidence, under such stipulation, defendant's affidavit made before the magistrate. *Ib.*

False Imprisonment.

MANDAMUS.

1. Where an officer of a corporation refuses to comply with the lawful directions of the corporate body, the party for whose benefit and in whose favor the directions are given, may, with the consent of the corporate body, be relieved by mandamus, and should not be put to an action against the corporate body for a specific performance. *Supreme Ct., I. Dist.*, 1863, People *a.* Brennan, 39 *Barb.*, 522.
2. An order for a mandamus which directs that the comptroller of the city of New York shall be required by such writ to procure the signature of the mayor, and the corporate seal to be affixed to bonds, is erroneous. The writ should only require the comptroller to do those acts which lie in his department and are personal to himself, viz., the preparation of the bonds and his own signature to them. *Ib.*
3. Where, on an order to show cause why a peremptory mandamus should not issue, the facts are admitted, or the excuse offered is insufficient, the court will, if the decision be in favor of the relator, direct a peremptory mandamus, without the previous issuing of an alternative writ. *Ib.*
4. Where the only material disputed fact does not, even conceding it to be as the defendant alleges, furnish any satisfactory cause against issuing the mandamus, it is wholly unnecessary to direct an alternative writ for the purpose of having a trial respecting that fact. *Ib.*

MARRIED WOMEN.

1. A married woman is liable for a breach of the covenants of a deed which she has given. The covenants induce the purchase, enlarge the

price, and thus benefit her estate. *Supreme Ct.*, 1864, Kolls *a.* De Leyer, *Ante*, 312.

2. The power to use, grant, devise, and convey real property, conferred upon married women, includes by implication the power of giving the usual covenants for title. *Ib.*

EVIDENCE, 21; EXECUTION, 3; EXECUTORS AND ADMINISTRATORS, 4; JUDGMENT, 10, 12; PARTIES, 3–5.

MORTGAGE.

1. A mortgage of partnership property, executed by one partner to secure a debt due by the firm, is valid. *N. Y. Superior Ct., Sp. T.*, 1858, Willett *a.* Stringer, *Ante*, 152.
2. Where a mortgage was given to "M. and W., executors of the estate of E.," and payable to "the party of the second part, his executors, administrators, and assigns;"—*Held*, that the appellation was merely descriptive, and that the mortgage was the individual property of M. and W. *Ct. of Appeals*, 1864, People *on rel.* Eagle *a.* Keyser, *Ante*, 214.
3. A mortgagee in possession has the right to require full payment of the amount due, before he can be called upon to surrender the right of possession to any extent. *N. Y. Superior Ct., Sp. T.*, 1860, Fogal *a.* Pirro, *Ante*, 113.
4. But in an action, by several plaintiffs, to obtain a redemption of premises from the mortgagee in possession, where the right of some of the plaintiffs is barred by the Statute of Limitations, the plaintiffs not barred are entitled to redeem their share of the land on payment of their proportion of the debt. *Ib.*
5. The mortgage interest, as distinct from the debt created by the bond, has no determinate value, and is not a fit subject for an assignment. *Supreme Ct., VII. Dist.*, 1863, Cooper *a.* Newland, *Ante*, 342.

EVIDENCE, 6; EXECUTION, 4.

MOTIONS AND ORDERS.

1. In an action upon a judgment recovered in a sister State, proof that the defendant appeared in the original action, and a certified copy of the judgment record, are, in the absence of affidavits on the part of the defendant, sufficient evidence of the falsity of an answer denying knowledge or information sufficient to form a belief as to the recovery of the judgment and the jurisdiction of the court which rendered it. *N. Y. Superior Ct.*, 1863, Beebe *a.* Marvin, *Ante*, 194.

2. Although relief against irregularities cannot be obtained on a notice of motion not specifying the defects, yet in proper cases the motion should be denied without prejudice to its renewal. *N. Y. Superior Ct., Chambers*, 1860, Macomber *a.* Mayor, &c., of N. Y., *Ante*, 35.
3. A motion to modify a judgment of the special term, or to excuse the literal performance of its requirement, must be made at the special term, and not at general term. *N. Y. Superior Ct.*, 1861, Davis *a.* Duffie, 8 *Bosw.*, 691.
4. An order granting the moving party a favor is not imperative upon him unless so expressed. *Supreme Ct., I. Dist., Chambers*, 1861, Neill *a.* Wuest, *Ante*, 319, *note.*

ALIMONY, 3; ARREST, 6; DISCOVERY AND INSPECTION; EXECUTORS AND ADMINISTRATORS, 25–27; INTERPLEADER, 5; JUDGMENT, 1, 10; SERVICE, 3–6; WAIVER, 1.

MUNICIPAL CORPORATIONS.

1. Where an officer of a municipal corporation refuses to execute or deliver the bonds of the corporation in payment of the price of land purchased by the corporation, as directed to do, the appropriate and proper remedy is by mandamus, and not an action for the price or for damages against the corporation by the vendor. *Supreme Ct., I. Dist.*, 1863, People *a.* Brennan, 39 *Barb.*, 522.
2. Although ordinarily, the combining, in one proceeding, of improvements and assessments therefor, so dissimilar in their natures as the grading of a street and erecting a bridge thereon and the construction of a sewer, would be vicious in principle, yet where the sewer is a a part of the bridge, and its only purpose is to relieve the bridge from the effect of water collecting upon the street, no valid objection exists. *Supreme Ct., II. Dist.*, 1863, People *a.* Village of Yonkers, 39 *Barb.*, 266.
3. The power of commissioners, in a street assessment, extends only to known, ascertained, and fixed expenses. No others are allowable. *Ib.*
4. Thus, where in the estimate of the expenses of an improvement, there was an item of $460.05 for "*contingencies;*"—*Held*, that the insertion of this item rendered the assessment illegal and void. *Ib.*
5. A remonstrance against proceedings in assessments for a local improvement will not be regarded, if signatures necessary to make out the majority are not made by the parties whose names are used and are not duly authenticated. *Supreme Ct., II. Dist., Sp. T.*, 1858, Matter of Tompkins Square, *Ante*, 324, *note.*
6. The common council of a municipal corporation may act upon the pe-

tition and the remonstrance in a street case, presented to their predecessors in the preceding year. *Ib.*

7. At a meeting of a board of village trustees, certain proposals for the grading of a street and building of a bridge which had been advertised for were opened, and the contract was awarded, but before this conclusion was reached, the specifications were amended so as to extend the time for the completion of the work;—*Held*, that such extension of time did not vitiate all the proceedings. *Supreme Ct., II. Dist.*, 1863, People *a.* Village of Yonkers, 39 *Barb.*, 266.

ACTION, 4; NEW YORK; STATUTES.

NEW TRIAL.

1. After judgment entered absolutely, a motion upon a case or exceptions, for a new trial, cannot be heard at special term. *N. Y. Superior Ct.*, 1863, Anderson *a.* Dickie, *Ante*, 83.
2. Power of the Supreme Court, on appeal from the City Court of Brooklyn, to grant a new trial. Von Latham *a.* Rowan, *Ante*, 237.
3. Where an action to recover a sum alleged to be due for work and labor done, by the plaintiffs, for the defendants, and at their request, is tried before a referee, who finds for the plaintiffs the sum claimed, and his report contains a statement of the matters of fact found by him, and many of such matters are not embraced within the terms of the issue, and the report does not in terms pass upon the substance of the issue made by the pleadings, and the evidence in the case would not warrant a finding of such issue, in its substance in the plaintiffs' favor; and many of the material facts specified as found, are contrary to evidence.—the report will be set aside and a new trial granted. *N. Y. Superior Ct.*, 1861, Sackett *a.* N. Y. & New Haven R. R. Co., 8 *Bosw.*, 228.
4. Where a complaint states as a cause of action, a contract between defendant and H. C., for the sale and delivery, by the latter, of a specified quantity of lumber, part performance thereof, and, a subsequent material modification of the contract by those parties, and subsequently thereto, an assignment by H. C. to the plaintiffs of the contract as thus modified, and of the lumber to be delivered under it, and a subsequent offer by the plaintiffs to perform, and a refusal by the defendant; and the proof is that H. C. assigned to the plaintiffs before the alleged modification, and that such modification, if any there was, was by an agreement between the plaintiffs and defendants;—a verdict against the defendant will be set aside upon terms; although the objection does not appear to have been taken, that on such pleadings and proofs,

the plaintiffs could not recover; the merits of the case upon the evidence alone, not appearing to be clear against the defendant. *N. Y. Superior Ct.*, 1860, Curtiss *a.* Marshall, 8 *Bosw.*, 22.

5. Where, in an action to recover damages occasioned by the collision of vehicles in the highway, it appeared that the collision was occasioned by the plaintiff's unwisely and unnecessarily turning his horse, so as to throw the rear part of his cart against the defendant's car;—*Held*, that a verdict for the plaintiff was against evidence. *Supreme Ct.*, 1864, Suydam *a.* Grand-street & Newtown R. R. Co., *Ante*, 304.

6. The plaintiff in an action to recover possession of real estate, introduced in evidence, on the trial, a judgment roll in another action in which the title to the premises had been adjudged to be in him, whereupon a verdict was directed for the plaintiff. Defendant then moved for a new trial on exceptions, and the motion was denied on the ground that the question was *res judicata.* After such decision, the Court of Appeals reversed so much of the judgment which was given in evidence as determined any question of title between the parties;—*Held*, that the order denying the motion for a new trial, and the judgment which had been entered, should be set aside, and that a re-argument of the remaining exceptions should be allowed. [15 Mass., 207; 14 Ib., 233; 34 *Barb.*, 515; 11 Abbotts' Pr., 66.] *Supreme Ct., VI. Dist.*, 1864, Gilchrist *a.* Comfort, 26 *How. Pr.*, 394.

DAMAGES, 6; EVIDENCE, 38; EXCEPTIONS; JUSTICES' COURTS, 7–11.

NEW YORK (CITY OF).

1. In case of a vacancy in the board of trustees of common schools in New York city, the remaining members of the board are authorized to continue the performance of the duties of the board without waiting till the vacancy is filled, inasmuch as the power of appointment, or of nominating for appointment, is not vested exclusively in the board of trustees. *N. Y. Com. Pl.*, 1863, Gildersleeve *a.* Board of Education, *Ante*, 201.

2. Where, in proceedings to open a public place between designated streets in the city of New York, by widening one of the streets and closing a part thereof, pursuant to the statutes in that behalf, the commissioners report that a part of one of the streets (describing it) "is required for the purpose of being closed, and vesting the same to the use of the mayor, aldermen and commonalty of the city of New York," and award a specified sum for damages to be paid to the owner therefor, and such owner, with knowledge of the proceedings and of the fact that such sum is awarded to be paid as damages for divesting

his title and vesting it in the corporation, accepts the sum so awarded, he is thereby estopped from alleging that he did not consent to such proceedings, and that the title to such premises did not become vested in the corporation. *N. Y. Superior Ct.*, 1861, Sherman *a.* McKeon, 8 *Bosw.*, 103.

3. The act empowering a justice of the Supreme Court, on petition, to set aside assessments in New York for fraud or legal irregularities in the proceedings relative thereto (*Laws of* 1858, 574, ch. 338), is a remedial statute, and should be liberally construed. *Supreme Ct., I. Dist.*, 1864, Matter of 80th street, *Ante*, 324.
4. Section 5 of Laws of 1859, ch. 489,—which authorizes the comptroller to move to open judgments against the city,—renders the belief of the comptroller sufficient ground for his intervention. Such belief existing, he is entitled to prosecute any mode of relief which might be claimed by the city; and this even though fraud and collusion are denied or disproved. *N. Y. Superior Ct., Chambers*, 1860, Macomber *a.* Mayor, &c., of N. Y., *Ante*, 35.
5. The employment of attorneys other than the corporation counsel to represent the city of New York is valid. *Ib.*
6. The consent of the corporation counsel to the employment of other attorneys, by the city of New York, gives them, when so employed, full power to represent the city as such attorneys. *Ib.*

JUDGMENT, 19, 20; PARTIES, 1.

NEW YORK COMMON PLEAS.

Under the act of 1840, the examination to obtain the deposition of an involuntary witness, on a motion in the New York Common Pleas, was required to be taken before a judge; by the 401st section of the Code, as amended in 1862, such examination may be taken before a referee. The Code merely confers on the court an additional power to send the witness before a referee; but does not repeal or modify the act of 1840. *N. Y. Com. Pl., Sp. T.*, 1864, Clark *a.* Brooks, 26 *How. Pr.*, 254.

NEW YORK DISTRICT COURTS.

It seems, that the clerks of the New York District Courts have power to administer oaths under Laws of 1857, ch. 344, § 75. *Supreme Ct., I. Dist.*, 1863, People *on rel.* Cole *a.* Alden, 26 *How. Pr.*, 166.

SUMMARY PROCEEDINGS, 2.

NEW YORK (District Courts of).

New York District Courts.

NEW YORK SUPERIOR COURT.

A complaint in an action brought in the New York Superior Court against a foreign corporation, upon a note, which it alleges was in terms payable in the city of New York, states a cause of action within the jurisdiction of the court, even though the plaintiff be a non-resident. *N. Y. Superior Ct.*, 1861, Spencer *a.* Rogers Locomotive Works, *Ante*, 110.

NONSUIT.

Justices' Court, 5, 6; Trial, 12–14.

NOTARY.

Form and effect of official certificate under seal, by notary. Olcott *a.* Tioga R. R. Co., 40 *Barb.*, 179.

NOTICE.

1. Where there is an agreement between two parties to submit any matter of difference between them to the decision of a third person, it is essential to a final and conclusive decision that both parties should have notice of the time and place when such third person is to investigate the matter with a view to such decision, unless there be something in the terms of the agreement declaring or clearly importing that such notice need not be given. *N. Y. Superior Ct.*, 1861, Collins *a.* Vanderbilt, 8 *Bosw.*, 313.
2. The same rule applies whether the third person is in the employment of one of the parties to the work, or is a stranger. *Ib.*
3. The members of a body intrusted with the management of a matter of public concern,—*e. g.*, a board of school trustees,—are deemed to have notice of a general or stated meeting held pursuant to the by-laws of the body. *N. Y. Com. Pl.*, 1863, Gildersleeve *a.* Board of Education, *Ante*, 201.
4. Requisites of notice of assessment of taxes under 1 Rev. Stat., 393. Wheeler *a.* Mills, 40 *Barb.*, 644.

Admeasurement of Dower, 2; Appeal, 12; Justices' Court 11; Trial, 13.

OFFICER.

The office of a trustee of common schools in the city and county of New York becomes vacated by the removal of the incumbent from the county. *N. Y. Com. Pl.*, 1863, Gildersleeve *a.* Board of Education, *Ante*, 201.

HIGHWAYS; MUNICIPAL CORPORATION; NEW YORK, 1; PARTIES 6; POWERS.

PARTIES.

1. The Board of Education of the city and county of New York may be sued; possessing the powers and privileges of a corporation, it is subject to the obligations incident to such powers. *N. Y. Com. Pl.*, 1863, Gildersleeve *a.* Board of Education, *Ante*, 201.
2. The master of a ship is entitled to sue in his own name for freight, even though he is not the owner of the ship, and the bill of lading was not signed by him. *N. Y. Com. Pl.*, 1863, Kennedy *a.* Eilau, *Ante*, 73.
3. A married woman may be sued, in all matters respecting her separate estate, as if she were single. *Supreme Ct.*, 1863, Morrell *a.* Cawley, *Ante*, 76.
4. This rule applies to the form of the action as well as to the parties. *Ib.*
5. A married woman to whom a promissory note has been given as her separate property, may bring an action upon it in her own name alone; and defendant cannot set up a demand against her husband as a counter-claim. *Supreme Ct., VII. Dist.*, 1863, Paine *a.* Hunt, 40 *Barb.*, 75.
6. An action to recover penalties by "The Board of Trustees of the Fire Department of the Eastern District of the city of Brooklyn," which is authorized to be brought in their own name, under the act of 1860 (*Laws of* 1860, ch. 472), must be brought in the individual names of the trustees, with the addition of their name of office—not by the designation of their official title merely. It has always been required that when the suit is by an officer for the benefit of the body he represents, it shall be brought in the proper name of the individual, with the addition of his name of office. [4 Hill, 136; 5 Ib., 215; 1 Den., 279.] There is nothing in the act of 1860 indicating any intention of the Legislature to establish a different rule in this case. Were the plaintiffs to sue in the name of office merely, and should they bring

an unfounded action, no judgment for the defendant's costs could be collected, as the board of trustees have no property. *Supreme Ct., II. Dist.*, 1863, Trustees of Fire Department of Brooklyn *a.* Acker, 26 *How. Pr.*, 263.

7. A mutual insurance company may maintain an action for damages against one who, by assuming to act as agent for a third person, without authority, has procured insurance, and given a note in the name of the latter, which is not binding upon him. The provision in the statute authorizing the corporation to maintain suits against members or stockholders (*Laws of* 1849, 448, § 16), does not limit the right of action of such corporation to suits against members or stockholders. It was not designed to restrict its power to maintain suits, but to remove a possible doubt as to its right to maintain suits at law against members and stockholders arising from the *quasi* partnership character of the companies. They may sue like other corporations. [§ 17.] *Ct. of Appeals*, 1863, White *a.* Madison, 26 *How. Pr.*, 481.

8. The statute providing for the appointment of trustees of the estates of debtors imprisoned for crimes (2 *Rev. Stat.*, 15), does not make it necessary to have trustees of the estate of an imprisoned debtor appointed, in order to foreclose a mortgage upon his property. The appointment of trustees would not dispense with the necessity of making him a party to the action of foreclosure. *N. Y. Superior Ct.*, 1861, Davis *a.* Duffie, 8 *Bosw.*, 617.

9. Plaintiff was in actual possession of land, under a contract to purchase, and was entitled to a conveyance upon making the payments required; —*Held*, that he could maintain an action against third persons to recover damages for injuries done to his interest while he was in the actual occupation and possession of the premises. As the possessor of the premises, he was entitled to maintain the action. [2 Greenl. Ev., § 618; 1 Ch. Pl., 71; 20 Barb., 311.] *Supreme Ct., III. Dist.*, 1862, Honsee *a.* Hammond, 39 *Barb.*, 89.

10. A surviving assignee in trust cannot maintain an action against the executors or administrators of a deceased co-assignee, to require them to account for and pay over money collected by the deceased as such assignee. The *cestuis que trust* are the proper plaintiffs. *Supreme Ct., I. Dist., Sp. T.*, 1864, Bartlett *a.* Hatch, *Ante*, 461.

11. An assignee for the benefit of creditors represents, in his capacity as assignee or trustee, all the creditors of the estate, and they are not necessary parties to an action for a payment out of the fund. *Supreme Ct.*, 1864, Mathews *a.* Duryee, *Ante*, 256.

12. A person against whom the plaintiff has a right to any final relief in his action against other principal defendants, is properly made a party

defendant. *Supreme Ct., I. Dist., Sp. T.*, 1863, Hammer *a.* Barnes, 26 *How. Pr.*, 174.

13. Thus the plaintiff in an action to restrain a defendant from disclosing a secret of manufacture, in violation of his contract, may join as defendant a person to whom the principal defendant has communicated the secret. *Ib.*

14. But such person is not a necessary party. *Ib.*

15. Where there is nothing in the complaint to show that the judgment-debtor has attempted to collude with the judgment-creditor to cheat the attorney of the latter out of his costs, the judgment-debtor cannot be made a party in an action by the attorney to recover his costs, with a view of having the amount declared a lien upon the judgment. *Supreme Ct., V. Dist.*, 1863, Adams *a.* Fox, 40 *Barb.*, 442.

16. The non-joinder of a party plaintiff or defendant, is no ground for a dismissal of the complaint, defendant having failed to raise the objection by demurrer or answer. *Ct. of Appeals*, 1863, Hosley *a.* Black, 26 *How. Pr.*, 97.

17. Under the Code of Procedure, a defendant is not entitled to compel an assignee of the cause of action pending the suit, to become a plaintiff without his consent. *Supreme Ct., I. Dist.*, 1864, Packard *a.* Wood, *Ante*, 318.

AMENDMENT, 5; ANSWER, 9; DEFENCES, 15; EXECUTORS AND ADMINISTRATORS, 33, 34; WILL, 6.

PARTNERSHIP.

1. Where a partner lends trust-money to his firm, no debt is created against the joint estate in favor of the *cestuis que trust*, unless the fact of its being trust-money is known to the other partners. *N. Y. Superior Ct., Sp. T.*, 1858, Willett *a.* Stringer, *Ante*, 152.

2. Of the liability of partners, where the statute is not fully complied with, in the organization of a limited partnership. Haviland *a.* Chase, 39 *Barb.*, 283.

EXECUTORS AND ADMINISTRATORS, 32.

PAYMENT INTO COURT.

Under a decree that the plaintiff is entitled to redeem from a mortgage and to have a conveyance thereof, with covenants against the grantor's acts, upon payment of a specified sum, the plaintiff is not bound to pay the redemption money unless the defendant complies with the di-

rections of the decree respecting a conveyance. Hence the inability of the defendant to convey or to give a covenant against his own acts which will not be broken in its inception, is not a ground for granting plaintiff leave to pay the money into court instead of tendering it to defendant. *N. Y. Superior Ct.*, 1861, Davis *a.* Duffie, 8 *Bosw.*, 691.

PENALTIES.

Equity.

PLACE OF TRIAL.

An action which involves the question whether a conveyance of land is fraudulent as against creditors is not necessarily local, within the meaning of section 123 of the Code of Procedure, so as to require the place of trial to be laid in the county where the land lies. *Supreme Ct.*, 1863, Rawls *a.* Carr, *Ante*, 96.

PLEADING.

1. In pleading, the fact to be established by evidence must be averred, not the evidence itself. Illustrations of this rule. *Supreme Ct.*, 1863, Cahill *a.* Palmer, *Ante*, 196.
2. The rule that under a complaint setting out a contract, and averring its performance by the plaintiff, evidence in excuse for non-performance is not admissible, has become of little importance in view of the power of amendment given to the court by section 173 of the Code. *Ct. of Appeals*, 1863, Hosley *a.* Black, 26 *How. Pr.*, 97.
3. In pleading the judgment of a court of record of a sister State, the provision of section 161 of the Code of Procedure applies; and it is sufficient to allege that the judgment was duly recovered, without stating the facts conferring jurisdiction. *Supreme Ct., Sp. T.*, 1864, Halstead *a.* Black, *Ante*, 227.
4. A party who has wholly performed a special contract on his part may bring his action upon the implied agreement of the other party to pay the stipulated price; and is not bound to set forth specially the agreement. *Ct. of Appeals*, 1863, Hosley *a.* Black, 26 *How. Pr.*, 97.
5. And under such form of complaint he may give evidence to excuse a departure from the contract. *Ib.*
6. In an action for a conspiracy, the rule is to allow a great latitude in setting out in the complaint the particular acts from which the conspiracy is to be inferred, even so far as to allow the individual acts of

the conspirators to be averred. *Supreme Ct., Chambers*, 1863, Mussina* *a.* Clark, *Ante*, 188.

7. So far as the allegations of such acts are scandalous, they should be stricken out, unless they appear to relate to the foundation of the plaintiff's action. *Ib.*
8. Allegations which can in no aspect of the case made by a pleading be material, are irrelevant, and should be struck out on motion. *Supreme Ct.*, 1863, Cahill *a.* Palmer, *Ante*, 196.
9. In actions in local courts of general jurisdiction,—*e. g.*, the New York Superior Court,—it is unnecessary to allege in the complaint the facts, such as residence of the parties, which are necessary to the jurisdiction of the court over the person of the defendant. *N. Y. Superior Ct.*, 1861, Spencer *a.* Rogers Locomotive Works, *Ante*, 110.
10. In averring the offence, in an action for divorce on the ground of adultery, precision as to time, place, and circumstances, is required. *N. Y. Superior Ct.*, Anonymous, *Ante*, 48.
11. Examples of sufficient and insufficient averments in this respect. *Ib.*
12. Evidence of adultery in an action of divorce must accord with the allegations of such offence in the pleadings. *Ib.*

Amendment; Answer; Complaint; Counter-claim; Defences; Demurrer; Injunction, 3; Justices' Courts, 4; Limitations of Actions, 7; Parties, 3–6; Process; Variance.

POWERS.

1. When a general power is conferred upon two or more bodies, they must all come together for consultation and deliberation; though when they have done so, the vote of the majority of the persons present controls, even though one of the bodies should leave before the vote is taken. *N. Y. Com. Pl.*, 1863, Gildersleeve *a.* Board of Education, *Ante*, 201.
2. The provision of 2 Rev. Stat., 555, § 27, that where a duty or authority is confided by law to three or more persons, a majority of such body may act upon a meeting of all, is applicable to the boards of trustees of common schools in the city of New York. *Ib.*
3. This provision, in its application to bodies intrusted with the management of matters of public concern, is to be thus interpreted: that when all the members are notified that a meeting is to be held, and a majority of the whole number attends, the majority so attending may organize and legally proceed to the transaction of business. As respects

* See note on page 508, *supra*.

those who neglect or refuse to attend, it is the same as if they had attended and dissented from the act of those who were present. *Ib.*

4. Where, in matters of a private nature, a power is to be exercised by certain designated individuals, all must concur in its exercise, and the death, absence, or disability of any one of them, will not make the execution of the power by the remainder of them valid. *Ib.*
5. But where powers, to be exercised as a continuous public trust or duty, are confided to designated persons, and some die or become disqualified, the others may discharge the trust or perform the duty, provided there is a sufficient number to confer together, deliberate, and in view of a possibility of division of opinion, to decide upon the course to be adopted. *Ib.*
6. If such a power or duty is confided to two only, and one dies or becomes incapable of discharging it, the other cannot act alone, unless, to prevent a failure of justice, it is indispensable. *Ib.*

PROBATE.

Will.

PROCESS.

The provisions of 2 Rev. Stat., 425, § 9, that no process, pleading, or record be impaired without the order of court, is still in force. *N. Y. Superior Ct., Chambers*, 1860, Macomber *a.* Mayor, &c., of N. Y., *Ante*, 35.

Stamps, 1.

QUESTIONS OF LAW AND FACT.

1. Upon the uncontradicted testimony of an agreement between the mortgagor and mortgagee of chattels that the former may remain in possession of and may go on selling the chattels, it is error to submit it to the jury to determine, as a question of fact, whether the mortgage is fraudulent. *N. Y. Superior Ct.*, 1861, Marston *a.* Vultee, 8 *Bosw.*, 129.
2. That, where the evidence is conflicting, the question whether the plaintiff was on the car as a passenger, and was pushed off, or was there without right and dropped off, is one for the jury and not for the court to determine. Meyer *a.* Second Ave. R. R. Co., 8 *Bosw.*, 305.
3. Where the evidence upon the questions of the misapplication of a note made for a specific purpose, and of the plaintiffs' taking it, *bona fide*, for value, is conflicting, it must be submitted to the jury, and

their verdict is conclusive. *N. Y. Superior Ct.*, 1861, Duncan *a.* Gösche, 8 *Bosw.*, 243.

EVIDENCE, 39, 67, 68.

RECEIVER.

After judgment on failure to answer, in an action by a receiver of a corporation, defendant moved to set aside the judgment on the ground, among others, to enable him to set up as a defence, that the plaintiff was not duly appointed receiver. *Held*, that as the plaintiff was acting under an order of the court acquiesced in by the company of whose assets he was appointed receiver, the defendant, a debtor to the company, could not object to the irregularities, if there was in the original proceedings enough to give the court jurisdictiou. *Supreme Ct., Chambers*, 1858, Jay *a.* De Groot, *Ante*, 36, *note.*

RECEIPT.

A receipt or release may be avoided by proof that it was obtained without consideration, or by misrepresentation, or that it has been rescinded by agreement. *Supreme Ct.*, 1863, Van Nest *a.* Talmage, *Ante*, 99.

RECOGNIZANCE.

1. A recognizance conditioned that the prisoner shall appear at the next court of Oyer and Terminer to answer to an indictment; that he should "not depart without leave of the court," and that he should "abide its order and decision," requires, substantially, the appearance on the first day of the term and *de die in diem* during its continuance, unless discharged by the court. Whether he is called on the first day or not, he must remain and be ready to answer on any subsequent day. *Supreme Ct., III. Dist.*, 1862, People *a.* McCoy, 39 *Barb.*, 73.
2. The meaning of the condition is not simply that the prisoner shall submit to a trial, but that he shall at all times, until surrendered or ordered into custody, submit himself to the jurisdiction or authority of the court; and that he shall be held to answer during the whole term of the court and until the trial is ended. *Ib.*
3. Where, under such a recognizance, the prisoner appeared in court, answered when called, and without having been surrendered by his bail or ordered into custody, entered upon his trial, but, before the conclusion of his trial, departed from the court without leave and did not return;—*Held*, that his recognizance was forfeited. *Ib.*

4. A recognizance taken in the proper court and returnable "at the next court of Oyer and Terminer,"—*Held*, not void for uncertainty. The fair interpretation is, that the court of Oyer and Terminer of the county where the indictment was found, and where it could be tried, and where the recognizance was taken, was intended. *Ib.*

RECORDING DEEDS.

Under the provisions of 1 Rev. Stat., 761, § 28, the register is bound to discharge of record a mortgage in favor of two or more jointly, on receiving a certificate of satisfaction executed and acknowledged by one only of such mortgagees. *Ct. of Appeals*, 1864, People *on rel.* Eagle *a.* Keyser, *Ante*, 214; S. C., below, 39 *Barb.*, 387.

RECORDS.

JUDGMENT; PROCESS.

RECOUPMENT.

1. A lessee who has been evicted from a portion of the privileges granted by the lease, by a paramount title in a stranger, is discharged from the rent *pro tanto*, and is entitled to an apportionment, by which the rent shall be paid only in respect to the residue. *Supreme Ct., III. Dist.*, 1862, Carter *a.* Burr, 39 *Barb.*, 59.
2. But in an action for rent, the lessee cannot recoup the value of the lease over and above the rent, nor for rents he might have realized, or for special damages incurred by reason of his eviction from a portion of the privileges granted. *Ib.*

SET-OFF.

REDEMPTION.

1. Where a tenant has been ejected by judgment, for non-payment of rent, a judgment-creditor of his may proceed in equity, by action commenced within six months after the execution of the judgment in ejectment, to redeem the leasehold. The tenant himself may redeem after a re-entry for non-payment, or after recovery of possession by ejectment for the same cause; and the tenant's creditor whose remedy at law is exhausted, may have the benefit of this equity. *Supreme Ct., IV. Dist., Sp. T.*, 1864, Corning *a.* Beach, 26 *How. Pr.*, 289.
2. In such action, the landlord must be awarded the rents and costs of

the ejectment; but where the value of use and occupation since the re-entry equals the rents in arrear, the latter may be deemed satisfied. *Ib.*

3. The premises will be sold by the sheriff on the usual notice, and the purchaser will hold according to the lease; and possession will be given forthwith, according to the practice in judicial sales in equity. *Ib.*
4. Where the mortgagee in possession, who has in good faith disavowed the character of mortgagee, and claimed in hostility to such a character, is obliged to submit to a redemption, the general rule is, that the improvements must be paid for. *N. Y. Superior Ct., Sp T.*, 1860, Fogal *a.* Pirro, *Ante*, 113.
5. On a redemption, the mortgagee in possession, who knew of the existence of the mortgage, is not, as a general rule, entitled to an allowance for new erections and improvements upon the mortgaged premises. But this rule is subject to many exceptions. *Ib.*
6. A judgment-debtor whose land has been sold on execution, subject to an antecedent mortgage, and whose equity of redemption has been subsequently foreclosed and sold, has no right to redeem under the statute, as a judgment-debtor whose real property has been sold on execution. *Supreme Ct., Sp. T.*, 1857, Husted *a.* Dakin, *Ante*, 137.

REFERENCE.

1. In an action for divorce, on the ground of adultery, where a defence may possibly exist, the defendant will not be required to consent to a reference, even as the condition of a favor. *Supreme Ct., I. Dist.*, 1863, Cordin *a.* Cordin, 26 *How. Pr.*, 187.
2. In an action on an insurance policy, where the defence involves a charge of fraud on the part of the insured, a compulsory reference of the issues cannot be ordered. *N. Y. Superior Ct.*, 1861, McLean *a.* East River Ins. Co., 8 *Bosw.*, 700.
3. A reference on some incidental point in the cause, refused, because applied for shortly before trial of the issues, the result of which might render the reference unnecessary. Clark *a.* Brooks, 26 *How. Pr.*, 277.
4. On an appeal from a judgment granting a divorce and awarding alimony, the general term have power, upon reversing the judgment as to the alimony, and affirming it in other respects, to order a reference to ascertain what allowance and security therefor are proper, and report the same with the proofs. This is not an assumption, by the general term, of original jurisdiction to order a reference on motion, but is incidental to the appellate power of the court, on reversing,

in part, a judgment in a matter of equitable cognizance. *N. Y. Superior Ct.*, 1861, Forrest *a.* Forrest, 8 *Bosw.*, 640.

5. But were such an order of reference irregular, so long as it stands unrevoked, it cannot be disregarded, or made the ground of reversing a final judgment thereon, by another general term, in subsequent proceedings in the same cause. *Ib.*

6. *It seems*, that proceeding on the reference, and subsequently at special term upon the referee's report, without objecting to the regularity of the order of reference, would be a waiver of the error, if any. *Ib.*

7. A referee appointed to hear and determine an action for limited divorce, has the same power which the court would have to provide in the judgment for the wife's maintenance. *Supreme Ct.*, 1863, Bihin *a.* Bihin, *Ante*, 19.

8. Judgment is properly entered upon his report without confirmation. *Ib.*

9. A referee has power, upon the trial, to permit an allegation in the complaint that the assignment to the plaintiff of a bond and mortgage in suit was in writing and for a certain sum, to be amended, by alleging that the assignment was by parol, and as security for an uncertain sum. *N. Y. Superior Ct.*, 1861, Hoyt *a.* Hoyt, 8 *Bosw.*, 511.

10. On a reference as to surplus moneys, under Rule 48, the referee, when he finds a lien regular and valid upon the record, has no right to go behind it to inquire whether it is irregular, fraudulent, or inequitable. *Supreme Ct.*, 1857, Husted *a.* Dakin, *Ante*, 137.

11. Nor when the referee has made his report, can the justice or regularity of the liens be examined upon the evidence taken before the referee. *Ib.*

12. The court will not allow such liens to be impeached collaterally, but only upon applications made directly for that purpose on a sufficient notice, in which the defects, irregularities, or frauds, are specifically pointed out. *Ib.*

13. On a reference as to surplus moneys, under Rule 48, the referee can take into account only absolute liens, as distinguished from equitable claims, not matured into liens. *Ib.*

14. On a reference to ascertain the claims to surplus moneys, objections cannot be raised to the regularity of proceedings in suits separate and distinct from that in which the reference was had, or to the good faith of the parties to those suits, or of the officers who were executing the process of the court therein. *Ib.*

15. Section 273 of the Code, requiring referees to report within sixty days, does not apply to a case of reference under the approval of the surrogate, where an executor or administrator doubts the justice of a

claim. *Supreme Ct., VI. Dist., Sp. T.*, 1864, Godding *a.* Porter, *Ante*, 374.

16. The statute requiring a referee to make his report in sixty days after the cause is submitted to him, contemplates that some step shall be taken in the cause after the expiration of that time, indicating an intention to disaffirm the right of the referee to make and deliver his report. [25 How. Pr., 1; 26 Ib., 164.] *Supreme Ct., VIII. Dist.*, 1864, Mantles *a.* Myle, 26 *How. Pr.*, 409.

17. By taking no such action until after the referee made and delivered his report, a party waives his right to proceed in the action as if no reference had been ordered. *Ib.*

18. The finding of a referee, that a bond was executed with the mortgage, which is proved only by the recital in the mortgage, is conclusive as to the execution of the bond. *Supreme Ct., VII. Dist.*, 1863, Cooper *a.* Newland, *Ante*, 342.

19. A finding of a referee, as a conclusion of fact, that an assignment was delivered in settlement of a previous demand, and, as a conclusion of law, that it was not received in extinguishment of an equal amount of indebtedness, may be construed to mean that it was received only as a security. *N. Y. Superior Ct.*, 1861, Hoyt *a.* Hoyt, 8 *Bosw.*, 511.

20. Though a referee did not find certain facts as clearly and particularly as might have been proper, and as the court might have required on motion, yet if on a review in the appellant court, the evidence sustains the general finding of the referee, the judgment for that cause will not be reversed. It is more proper to suspend the cause till the referee finds and reports the fact. *Supreme Ct., I. Dist.*, 1863, Union Bank *a.* Mott, 39 *Barb.*, 180.

21. Where a referee's report does not, in terms, specify a finding upon each of the material allegations in the complaint, but finds that there is "due to the plaintiff by the defendants," a specified sum, for which judgment is ordered, the report, on an appeal from the judgment, will not be disturbed, where there is nothing in the evidence or case repugnant to the inference that the referee did find all the allegations of fact essential to a recovery by the plaintiff, in his favor. *N. Y. Superior Ct.*, 1861, Richardson *a.* Dugan, 8 *Bosw.*, 207.

22. Where, on an allegation that the defendants owned a vessel, and employed and hired the plaintiff to go on board of her as master on a designated voyage, and that under such employment, he served as master on such voyage, the report states that the defendants held the legal title, but as security only, and had control of the voyage, and that the plaintiff went as master with their assent, and obeyed their orders, and was paid by them for his services, in part, as such master,

and that there is "due to the said plaintiff by the defendants" the sum of $1,262.75, for which he "is entitled to recover judgment herein against said defendants," it will be intended on an appeal from the judgment, that the referee found that the plaintiff was hired by the defendants, although the report does not in terms so state, if upon the evidence contained in the case, a finding to that effect would not be disturbed as unwarranted. *Ib.*

23. The court at special term has power to send back the report of a referee where it is so materially defective as not to pass upon all the issues referred to him. *Supreme Ct., I. Dist., Sp. T.*, 1863, Brown *a.* N. Y. Central R. R. Co., 26 *How. Pr.*, 32.

24. But such power should not be exercised where the aggrieved party has excepted to the report on this ground. *Ib.*

APPEAL, 34–44; EXECUTORS AND ADMINISTRATORS, 23–27.

RELEASE.

EXECUTORS AND ADMINISTRATORS, 32; RECEIPT.

REMITTITUR.

APPEAL, 47.

REMOVAL OF CAUSES.

1. Where a cause is to be removed from a State Court to a United States Circuit Court under the act of 1863, it is proper, though it is not essential, to apply to the State Court in which the action is first brought, for an order for its removal, and such order should be granted. *Supreme Ct., I. Dist.*, 1864, Jones *a.* Seward, *Ante*, 377.

2. *It seems*, that the bond should equal the sum for which the defendant has been held to bail, if at all. *Ib.*

REPLY.

DEFENCES, 12.

REPORTS.

Both at the common law and under the statute (*Laws of* 1854, 314, ch. 130), a fair report of a public official proceeding is a privileged communication, and is libellous only if there be proof of actual malice. *N. Y. Superior Ct.*, 1864, Edsall *a.* Brooks, *Ante*, 221.

RES GESTÆ.

EVIDENCE, 36, 52.

RESIDENCE.

EVIDENCE, 29; WILL, 2.

RULES.

TRIAL, 5.

SALES.

1. A person who has voluntarily parted with his goods to a fraudulent vendee, under circumstances which would vitiate the sale as against the latter, must, on reclaiming his property, protect from loss a purchaser in good faith from the fraudulent vendee. *Supreme Ct., I. Dist.*, 1864, Trigg *a.* Hitz, *Ante*, 436.
2. In such case it is the duty of the purchaser to give to the original owner of the goods all the information in his possession, to enable the owner to obtain his rights; if the latter omit or neglect to take the remedies open to him, the further liability of the purchaser ceases. *Ib.*

SECURITY FOR COSTS.

1. A non-resident plaintiff cannot be required to give more than one bond as security for costs, although there may be several defendants appearing separately. *Supreme Ct., Sp. T.*, Leftwick *a.* Clinton, 26 *How. Pr.*, 26.
2. Such bond should be executed in favor of all the defendants as obligees. *Ib.*
3. An order of court made *ex parte*, giving a receiver leave to sue, is not a bar to a motion to require such receiver to file security for costs. *Supreme Ct., I. Dist.*, 1864, Bolles *a.* Duff, *Ante*, 448.

SERVICE (AND PROOF OF).

1. Process for the commencement of an action against a convict in the State prison, may be served upon him in the prison. Although his right to sue is suspended, he may still be sued, and the suit prosecuted to judgment. *N. Y. Superior Ct.*, 1861, Davis *a.* Duffie, 8 *Bosw.*, 617.

2. Where a foreign corporation has been deprived of its rights and franchises by its own government, yet is not absolutely dissolved, jurisdiction over it in the courts of this State may be obtained by service of process upon its officers, and a receiver can derive title to its property under proceedings to recover debts due from the company. *Supreme Ct., I. Dist., Sp. T.*, 1863, Murray *a.* Vanderbilt, 39 *Barb.*, 140.
3. The validity of an order for the publication of summons, must be judged solely upon the sufficiency of the affidavits upon which it was granted. *Supreme Ct.*, 1863, Wortman *a.* Wortman, *Ante*, 66.
4. The only case in which a resident of this State can be proceeded against by publication under the provisions of the Code, is under the 2d subdivision of section 135. It is true that the first part of that section says, "When the person on whom service is to be made cannot be found, &c., within the State;" but that is qualified by the latter part of the section, which defines the special cases to which these general words apply. *Supreme Ct., Sp. T.*, 1858, Irving Savings Institution *a.* Hardman, *Ante*, 67, *note.*
5. The fact of defendant's non-residence, is insufficient to authorize an order for publication of summons: it must also appear that unsuccessful effort has been made to find the defendant within the State. *Supreme Ct.*, 1863, Wortman *a.* Wortman, *Ante*, 66.
6. Nor can such an order be sustained subsequently by proof that the defendant was not, in fact, within the State. *Ib.*
7. Where a judgment-debtor, who had been duly served, in supplementary proceedings, with an order for his appearance, moved to vacate the order, which motion was denied, with a direction that the debtor appear on a subsequent day;—*Held*, that the second order need not be personally served. *N. Y. Com. Pl.*, 1863, Johnson *a.* Tuttle, *Ante*, 315.
8. In the service of notices and other papers, in an action, made by mail (*Code*, §§ 408, 410), the *deposit* in the post office is the service; and no distinction is made between notices of trial and any other papers. *Supreme Ct., II. Dist., Sp. T.*, 1864, Elliot *a.* Kennedy, 26 *How. Pr.*, 422.
9. The deposit in the post office may be made at any hour of a day on which such service is proper, without regard to the closing or departure of the mail. *Ib.*
10. Service of papers upon the clerk of the court by mail, is effective only from the date of his actually receiving them. *Supreme Ct.*, 1863, Morris *a.* Morange, *Ante*, 86.

JURISDICTION, 7; LIMITATIONS OF ACTIONS, 8; STAMPS, 2.

SET-OFF.

1. Where the defendant sets up a claim against the plaintiff as a set-off, with a prayer for judgment for the excess of his demand over the amount claimed by the plaintiffs, his rights as to such demand, as well as the pleadings and evidence in relation thereto, are to be governed by the same rules as if he were a plaintiff suing upon such claim. *N. Y. Superior Ct.*, 1864, Benkard *a.* Babcock, *Ante*, 421.
2. An insurance company transferred to plaintiff a premium note as collateral security, upon which an action was brought by the transferees against the maker;—*Held*, that the latter could not set-off a loss under the policy for which the note was given, which did not accrue until after the transfer of the note. *Supreme Ct., I. Dist.*, 1863, Nelson *a.* Edwards, 40 *Barb.*, 279.
3. Damages sustained by the defendant as maker of a promissory note for the breach of contract by the payees to apply the proceeds of a consignment of wheat to the payment of such note;—*Held*, not the subject of set-off, in an action upon a subsequent note of the defendant's to the payees of the first, and transferred to the plaintiff after maturity: the first note having been collected and the second being a new and independent security and resting on a distinct consideration. *Supreme Ct., I. Dist.*, 1863, Titus *a.* Himrod, 39 *Barb.*, 581.
4. An assignment of a judgment upon condition of a rescission of the transfer in case the assignee can not avoid a set-off is not absolute enough to prevent such set-off. *N. Y. Superior Ct., I. Dist., Sp. T.*, 1863, Butler *a.* Niles, 26 *How. Pr.*, 61.
5. A set-off in favor of the holder of an assigned judgment will not be allowed, to defeat the claims of the defendant for costs accruing prior to the assignment, in actions and proceedings to enforce the defendant's judgment. *Ib.*

RECOUPMENT.

SHERIFF.

1. A sheriff by seizing goods on attachment, acquires such a special property in the goods as gives him an insurable interest. *Ct. of Appeals*, 1863, White *a.* Madison, 26 *How. Pr.*, 481.
2. And where the sheriff has authority to insure such goods, his deputy who seized them, may insure them in the name of the sheriff; but this power does not authorize the deputy to give a premium note in the name of the sheriff, and thus subject the sheriff to liability as a member of a mutual insurance company. *Ib.*

3. Whether the sheriff can recover the expenses of an insurance with his fees for the proceeding, *Query*. *Ib.*
4. A sheriff, who, acting under a warrant of attachment issued as a provisional remedy under the Code before judgment, has seized property in the possession of an assignee of the defendant in the attachment, may show in defence of an action against himself, to recover the value of such property, that the alleged sale was fraudulent as against the attaching creditors. *Ct. of Appeals*, 1863, Rinchey *a.* Stryker, 26 *How. Pr.*, 75.
5. Where a right of action has accrued against a sheriff for neglecting to return an execution, such right cannot be divested by an appeal being taken from the judgment by the defendant in the execution, even though the appeal is brought before the commencement of the action, against the sheriff. Where a sheriff neglects to execute process in his hands within the time required by law, he is allowed but one defence, to wit: that the defendant had no property out of which he could have made the money, had he endeavored ever so faithfully to do so [7 N. Y., 550], and the measure of damages is the amount of the execution. *Supreme Ct., III. Dist.*, 1862, Bowman *a.* Cornell, 39 *Barb.*, 69.

EXECUTION, 6, 7.

SHIPPING.

1. Under the act of Congress of July 29, 1850 (*U. S. Statutes at Large*, vol. 9, 440), a bill of sale, or conveyance of a vessel, is void as against an execution-creditor of the vendor, unless the bill of sale or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled, or unless such creditor, at the time of levying his execution, have actual notice of such bill of sale or conveyance. *N. Y. Superior Ct.*, 1861, Parker Mills *a.* Jacot, 8 *Bosw.*, 161.
2. Advances obtained by a shipmaster to compromise a claim against ship and cargo for salvage, and thus enable the vessel to proceed on her voyage, are properly chargeable against the owner, irrespective of the fact that the master is interested in the voyage to such an extent that the owner might not be liable for ordinary advances. *Supreme Ct.*, 1863, Lobach *a.* Hotchkiss, *Ante*, 88.

SPECIFIC PERFORMANCE.

The existence of an adequate remedy by action for damages, does not preclude the vendor of lands from suing for specific performance.

[Fry on Sp. P., 11; 2 Comst., 60.] *Supreme Ct., V. Dist.*, 1863, Schroeppel *a.* Hopper, 40 *Barb.*, 425.

ACTION, 4.

STAMPS.

1. A notice of appeal from the judgment of a justice of the peace is not original process within the meaning of the United States Internal Revenue Law of August 6th, 1861. *Chautauque Co. Ct.*, 1863, Jackson *a.* Allen, 26 *How. Pr.*, 119.
2. Where a copy of a summons is served without any indication that a United States revenue stamp is attached to the original summons, the action, on motion, will be dismissed for such omission. The copy served should contain an indication that there was a stamp on the original, or at least the stamp on the original summons should be shown at the time of serving the copy. *Supreme Ct., IV. Dist., Sp. T.*, 1864, Watson *a.* Morton, 26 *How. Pr.*, 383.

AMENDMENT, 7.

STAY OF PROCEEDINGS.

1. An appeal from a judgment, with the requisite security to effect a stay of proceedings, suspends proceedings supplementary to execution thereon; but the judge before whom such proceedings are pending has not power to dismiss them on that account. *N. Y. Superior Ct.*, 1863, Cowdrey *a.* Carpenter, *Ante*, 107.
2. If the judge could be deemed to have the power, its exercise would be inequitable. The creditor's lien is not taken away by the stay of proceedings, although its enforcement is delayed. *Ib.*

STATUTES.

1. A provision in a village charter, that the proposals for constructing a public work shall be opened on the day named in the notice, "or upon such other day as the trustees may adjourn to, for that purpose;"—*Held*, directory merely. It is not essential that the time for opening and looking at the proposals shall be continued by regular adjournment from time to time. *Supreme Ct., II. Dist.*, 1863, People *a.* Village of Yonkers, 39 *Barb.*, 266.
2. The trustees may open the proposals and accept that which is most favorable, at the day mentioned in the notice, or at an adjourned day,

or at a day to which they had not adjourned, in a case where the adjourned meeting had failed to take place. *Ib.*

STIPULATIONS; EVIDENCE, 5, 6; MALICIOUS PROSECUTION.

SUMMARY PROCEEDINGS.

1. Summary proceedings to recover the possession of lands are reviewable by certiorari, and not by appeal. *Supreme Ct., I. Dist.*, 1864, Freeman *a.* Ogden, *Ante*, 326, *note.*
2. Under the amendment of the Revised Statutes, by Laws of 1863, ch. 189, requiring the affidavit to procure a summons in summary proceedings to recover the possession of land to be sworn to before the clerk of the New York District Court, or his deputy, in proceedings instituted before the justices of such courts, an affidavit otherwise sworn to is insufficient, and the subsequent proceedings are void. *Supreme Ct., I. Dist.*, 1863, People *on rel.* Cole *a.* Alden, 26 *How. Pr.*, 166.

SUMMONS.

LIMITATIONS OF ACTIONS, 8; SERVICE (AND PROOF OF), 1–6.

SUPPLEMENTAL COMPLAINT.

1. The supplemental complaint contemplated by section 121 of the Code, as a substitute for a bill of revivor, is served as a matter of right; and upon such complaint, and the pleading of the adverse party, the propriety of allowing a continuance of the original action is the only question in controversy, and is to be tried like any other issue. *Supreme Ct.*, 1863, Matter of Borsdorff, *Ante*, 168.
2. The matter of a supplemental complaint must be consistent with and in aid of the case made by the original complaint. *Supreme Ct.*, 1863, Wattson *a.* Thibou, *Ante*, 184.
3. In an action upon notes, after answer that the notes had been paid by the acceptance of defendant's bonds in satisfaction,—*Held*, that it was improper to allow a supplemental complaint, setting forth such bonds, and claiming a recovery upon them. *Ib.*

CAUSE OF ACTION, 1; DIVORCE, 7; EVIDENCE, 4.

SUPPLEMENTARY PROCEEDINGS.

1. Proceedings supplementary to execution are in the nature of a new suit. A second order for the examination of a judgment-debtor issued

by a different judge, the first order not having been revoked or discharged, is irregular. *Supreme Ct., VI. Dist.*, 1863, Allen *a.* Starring, 26 *How. Pr.*, 57.

2. *So held*, where the first order had become ineffectual by reason of the non-attendance of the referee appointed to conduct the examination. *Ib.*

3. The commencement of supplementary proceedings against judgment-debtors alone, and the appointment of a receiver therein, creates no lien upon assets which the debtors have previously assigned. *N. Y Superior Ct.*, 1861, Field *a.* Sands, 8 *Bosw.*, 685.

4. Several creditors' actions were brought against debtors and their assignee, and the assignment was set aside and a receiver appointed, who duly qualified. After the commencement of these actions, and after a receiver was appointed and judgment was recovered in one of them, but before judgment in the others, C. commenced supplementary proceedings against the same defendants, and had the same receiver appointed. Subsequent to the commencement of these supplementary proceedings, other creditors commenced creditors' actions, in which they had similar judgments, which were recovered after the order appointing the receiver in the supplementary proceedings. The receiver obtained possession of the assets without bringing any judgment therefor. *Held*, that C. had not obtained any lien on the funds in the hands of the receiver appointed in the actions brought to set aside the assignment. The fact that the same receiver was appointed does not affect the question. The surplus held by the receiver enured wholly to the benefit of the plaintiffs in the creditors' actions. *Ib.*

5. A judgment in a creditor's suit against a debtor and his assignee, declaring the assignment void, is not evidence that it is void, in supplementary proceedings by another creditor against the same debtor, to which the assignee is not a party. *Ib.*

6. The payment of the principal sum due upon a judgment, is not a bar to supplementary proceedings to collect the interest. *N. Y. Com. Pl.*, 1863, Johnson *a.* Tuttle, *Ante*, 315.

7. In proceedings supplementary to execution, in case of dispute as to the title of property, supposed to belong to the judgment-debtor, but claimed by some third person, the proper course is to appoint a receiver who may by action test the claim. *Supreme Ct., III Dist.*, 1862, Teller *a.* Randall, 26 *How. Pr.*, 155.

8. And the officer entertaining the proceedings has not the power to try such disputed claim; nor by punishment as for contempt, or other summary proceedings, to enforce the application of the debtor's property to the payment of the judgment. *Ib.*

9. In proceedings supplementary to execution, under sections 294 and 297 of the Code of Procedure, against a person having property of a judgment-debtor, it is discretionary with the judge whether notice of proceedings shall be given to the judgment-debtor. *Supreme Ct.*, 1863, Ward *a.* Beebe, *Ante*, 1.

SERVICE, 7; STAY OF PROCEEDINGS.

SUPREME COURT.

INFANTS, 1; JURISDICTION, 6.

SURPLUS MONEYS.

1. The surplus money arising on a sale of land under mortgage foreclosure, stands in the place of the land in respect to those having liens or vested rights therein. *Supreme Ct.*, 1864, Mathews *a.* Duryee, *Ante*, 256.
2. Thus, the widow of the owner of the equity of redemption is entitled to dower in the surplus, as she was in the land before the sale. *Ib.*
3. The title of an assignee, for benefit of creditors, to surplus moneys arising upon the foreclosure of a mortgage given by his assignor, is of no higher degree than that of a creditor having a lien upon the land by judgment before the foreclosure sale. The right of the widow of the assignor to dower is paramount to either. *Ib.*

DOWER, 1, 2; JUDICIAL SALE, 3; REFERENCE, 10–14.

SURROGATES' COURTS.

1. The Surrogates' Court is always open. The absence of the surrogate or of the parties, on an adjourned day, does not abate the proceedings, or put the case out of court. *N. Y. Surr. Ct.*, 1861, Gilman *a.* Gilman, 1 *Redf.*, 354; affirmed, *Ib.*, 364; 38 *Barb.*, 364.
2. The provisions of 3 Rev. Stat., 5 ed., 174, § 29,—authorizing surrogates to compound debts belonging to an estate,—do not apply to demands against solvent debtors. *Ontario Surr. Ct.*, 1853, Howell *a.* Blodgett, 1 *Redf.*, 323.
3. The surrogate has not the jurisdiction to try or to establish a disputed debt. He can only determine the fact whether the debt be established or not. *N. Y. Surr. Ct.*, 1846, *In re*, Root, 1 *Redf.*, 263; S. C., 5 *N. Y. Leg. Obs.*, 124.
4. The surrogate may make an order of sale of real property upon the petition of the creditors under the provisions of the Laws of 1837, ch.

460, p. 536, although only one of the administrators ever made and filed an inventory of the personal estate. The administrators will not be allowed to allege their own neglect to render the proceedings by creditors inoperative. *Supreme Ct., V. Dist.*, 1863, Wood *a.* McChesney, 40 *Barb.*, 417.

5. If, however, it is shown by affirmative evidence that the surrogate did not acquire jurisdiction to make the order of sale, the proceedings will be held invalid as before, and for the same cause. *Ib.*

6. In an action of ejectment, by the heirs, against a purchaser under a sale made by order of the surrogate, it is not competent to prove in opposition to the statements of the petition upon which the order of sale was granted, that no account had been rendered by the administrators showing a deficiency of assets. The jurisdiction of the surrogate depends upon the petition and not upon matters outside of it. *Ib.*

CONTEMPT; EXECUTORS AND ADMINISTRATORS.

TAXES.

1. Under the act of 1855 (*Laws of* 1855, p. 44), non-residents who are pedlars of goods in this State, are liable to taxation upon the money invested in their business in each town in which they peddle their goods. And if they are actually assessed in more than one town, their remedy is to appear before the assessors and swear off the tax. *Supreme Ct., IV. Dist.*, 1864, Hitt *a.* Crosby, 26 *How. Pr.*, 413.

2. The commissioners of highways of the town of Hyde Park assessed highway labor against "H. R. R. Road," it not otherwise appearing from the list whether the assessment was against the lands of a non-resident or against the H. R. R. Road Co., a stock corporation, whose principal office was not in Hyde Park. The H. R. R. Road Co. had been assessed on the previous year's assessment-roll;—*Held*, that the assessment was against the corporation, and not against its real estate as land of a non-resident. *Supreme Ct.*, 1863, Fowler *a.* Westervelt, *Ante*, 59.

HIGHWAYS; INJUNCTION, 4; NOTICE, 4.

TENDER.

Vendor, under a contract, requiring all payments to be made before execution of deed, need not tender conveyance before suing. *Supreme Ct., VII. Dist.*, 1862, Adams *a.* Wadhams, 40 *Barb.*, 225.

ACTION.

TRIAL.

1. The right of trial by jury discussed. Sands *a.* Kimbark, 39 *Barb.*, 108.
2. The right to a trial by jury in civil cases is waived by entering on the trial before the court without a jury without making objections. *N. Y. Superior Ct.*, 1863, Moffat *a.* Mount, *Ante*, 4.
3. In an action for an accounting in respect to both real and personal property, the transactions being alleged to be in the nature of a partnership, the practice of courts of equity does not confer on either party the absolute right to a trial by jury. *Ib.*
4. Where, in an action between partners, to settle copartnership matters, it becomes evident to the court, on examination of the issues, that the several interests of the parties will, on the trial, involve much contradiction—perhaps questions of veracity—of mistake or fraud in the drawing of the papers, &c., and is manifestly an inquiry which business men, accustomed to examine facts, should decide, the court will direct the issues to be tried by a jury. *N. Y. Com. Pl., Sp. T.*, 1864, Clark *a.* Brooks, 26 *How. Pr.*, 285.
5. It is no objection to granting a proper application of this kind, that it is not made within ten days after issue joined, as provided by a general rule of the court. The court may deviate from the general rules whenever in its judgment a proper case is presented. *Ib.*
6. A juror, not a freeholder, nor assessed in respect to any personal estate, should be set aside, although it appears that he is worth in personal property, above all debts, two hundred and fifty dollars. *Supreme Ct.*, 1863, Valton *a.* National Loan Fund Life Assurance Society, *Ante*, 268.
7. A challenge of a juror, for principal cause, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, is not established by merely showing that he had formed an opinion that the prisoner killed the deceased, which he had never expressed. This was not an opinion as to the guilt or innocence of the prisoner. He might have killed the deceased, and still have been innocent of any criminal offence. *Ct. of Appeals*, 1863, Lowenberg *a.* People, 26 *How. Pr.*, 202.
8. The court will not order a struck jury in an action on a policy of marine insurance, where the allegation that the grounds of defence are intricate and difficult, is only substantiated by showing that the defence turns on the unseaworthiness of the vessel at the time she sailed, and on the fact that the master was chargeable with a want of competency and seamanship in not making a near port of distress at the time when the water is alleged to have been gaining upon and dis-

abling his vessel, and which he might and ought to have done in season to prevent her loss. The cases in which struck juries have been allowed, reviewed. *N. Y. Superior Ct., Sp. T.*, 1864, Walsh *a.* Sun Mutual Ins. Co., *Ante*, 356.

9. An offer of evidence containing some matter not admissible is properly rejected entirely. *Ct. of Appeals*, 1863, Hosley *a.* Brown, 26 *How. Pr.*, 97.

10. Where a wife's testimony as to cruel and inhuman treatment by her husband is offered in an action for limited divorce, an objection that a third person was present is insufficient: it should also be suggested that the third person is competent to testify. *Supreme Ct.*, 1863, Bihin *a.* Bihin, *Ante*, 19.

11. A witness was called by plaintiff to produce a written dissolution of partnership. He denied having it, and denied its existence, and then, on cross-examination swore that the firm was dissolved in 1844 or 1845;—*Held*, that this was an affirmative and independent fact, and could not be upheld as a cross-examination, there being nothing to cross-examine about, and should have been struck out on motion. *Supreme Ct., I. Dist.*, 1863, Union Bank *a.* Mott, 39 *Barb.*, 180.

12. A motion to dismiss the complaint at the trial should be denied where the plaintiff, by distinctly proving the contract and breach, has shown himself entitled to nominal damages at least. *N. Y. Superior Ct.*, 1861, Weber *a.* Kingsland, 8 *Bosw.*, 415.

13. In an action by the vendee of a vessel, claiming under a bill of sale, against an execution-creditor of the vendor, and the officer levying the execution, to recover possession of the vessel, a nonsuit is proper where actual notice, to the vendee and sheriff, of the bill of sale is not proved, and the evidence given is not sufficient to justify a jury in finding the fact of actual notice. It is not enough that they have knowledge of circumstances calculated to lead to inquiry, if, with the inquiry made, the facts do not convey actual notice of the bill of sale or conveyance. *N. Y. Superior Ct.*, 1861, Parker Mills *a.* Jacot, 8 *Bosw.*, 161.

14. Where, from the position and circumstances of the parties, a jury is likely to be influenced by a mistaken, though honorable, sympathy for the feeble against the strong,—*e. g.*, an humble citizen against a wealthy corporation,—it is peculiarly the duty of the court to withdraw the case from the consideration of the jury, if a verdict in accordance with such sympathy would be against evidence. *Supreme Ct.*, 1864, Suydam *a.* Grand-street and Newtown R. R. Co., *Ante*, 304.

15. A prisoner tried for a rape is not, in all cases, entitled to a direction from the court that he cannot be convicted unless the prosecutrix used the utmost reluctance in respect to the commission of the offence. The

request should be qualified, so as to include the circumstances under which the offence was committed, such as threats, intimidation, or fears of the prosecutrix. *Supreme Ct., I. Dist.*, 1864. People *a.* Monnais, *Ante*, 345.

16. Where, on the trial of an indictment, evidence of the acts and declarations of a third party had been admitted against the prisoner, with proof of complicity on his part sufficient to be submitted to the jury;—*Held*, that the prisoner was entitled to an instruction from the court that he could not be held accountable for the conduct of the third party, except so far as their acts were in complicity. *Ib.*

17. Where a judge, in charging the jury, informed them that they were to say whether a witness, who was not contradicted or impeached, was mistaken in his statements of a conversation which took place twelve years before;—*Held*, that such instruction was proper. *Supreme Ct.*, 1863, Valton *a.* National Loan Fund Life Assurance Society, *Ante*, 268.

18. On the trial of an action in which, from the form of the complaint, it seemed uncertain whether the damages were claimed for a malicious prosecution or a false imprisonment, the judge, at the close of the plaintiff's case, ruled, without objection from either side, that the proof offered showed that the plaintiff sought to recover for a false imprisonment. *Held*, that the case must be treated on appeal, as an action for false imprisonment. *Supreme Ct.*, 1862, Von Latham *a.* Rowan, *Ante*, 237.

19. After such an election by the court, acquiesced in by the plaintiff, admissions in the answer pertinent only in an action for malicious prosecution should be conformed to and construed by the evidence, and not made the ground of liability more extended than the proofs warrant. *Ib.*

20. Proper charge in case of an action for damages caused by a collision between the parties' vehicles in the street. Welling *a.* Judge, 40 *Barb.*, 193.

21. In actions for malicious injuries, it is proper for the judge to charge the jury as to the effect of their verdict on the question of costs, in case they should find for the plaintiff, and he may refuse to charge them that on arriving at the amount of the verdict they would give the plaintiff, they had nothing to do with the question of costs or whether or not their verdict would entitle him to full costs. *Supreme Ct., VI. Dist.*, 1863, Waffle *a.* Dillenbeck, 39 *Barb.*, 123.

22. In an action by the heirs of the grantors to recover possession of lands for a breach of the condition upon which they were conveyed, namely, to support and maintain S. and his wife, the grantors;—*Held*, that it was not erroneous to charge the jury that if S. had expressed

himself satisfied with the manner in which he was treated by the grantee, it was to that extent a waiver of strict performance. The charge must be deemed confined to the time when the admissions were made, and not as embracing a subsequent period. *Supreme Ct., III. Dist.*, 1862, Spaulding *a.* Hallenbeck, 39 *Barb.*, 79.

23. It is proper for the judge to leave it to the jury to determine whether the grantee intended in good faith to perform, and had substantially performed, the condition upon which the deed was executed; and that a substantial compliance would save the forfeiture. *Ib.*

24. In an action for rent, where the defendants set up a breach of plaintiff's covenant in the lease, that the premises should be free from percolation of water through the walls, &c., of the sub-cellar, it is proper to charge the jury that the defendants cannot claim for "any injury resulting from dampness not caused by percolation of water into the sub-cellar." Any necessary natural dampness incident to the location of the sub-cellar or its construction, and not effected at all by water getting through the walls or floor of the sub-cellar, is a consequence which the defendants themselves must bear. *N. Y. Superior Ct.*, 1864, Benkard *a.* Babcock, *Ante*, 421.

25. In an action against a railroad company, to recover damages for so negligently running a train of its cars, that the train ran over and cut hose lying across the track of the road and attached to fire engines in use at the time by firemen, who were endeavoring to extinguish the fire of buildings burning near the track of the road, whereby, as was alleged, the firemen were unable to subdue the fire they otherwise would have extinguished, and whereby the fire was communicated to other buildings which were burned; it is error to instruct the jury that, if there was negligence of the firemen in not using proper means to warn the approaching train of the fact of the fire and its locality, and that the hose was across the track, and that if such negligence concurred with that of the railroad company in producing the injury, the negligence of the firemen is to be deemed the plaintiff's negligence, and that such fact is a bar to his recovery. *N. Y. Superior Ct.*, 1861, Mott *a.* Hudson River R. R. Co., 8 *Bosw.*, 345.

26. Where the defendants, in addition to making alleged misrepresentations, to procure a sale of goods to a third person, offered and agreed to indorse the purchaser's note to be given for the goods, it is error to refuse to charge that, if the misrepresentations in any degree contributed to induce the plaintiffs to sell the goods, they are entitled to recover, when the evidence warrants a finding that the plaintiffs were so induced. *N. Y. Superior Ct.*, 1860, Shaw *a.* Stine, 8 *Bosw.*, 157.

27. In a charter party of an American vessel, made in London, and executed only on the part of the owner and the charterer of the vessel, the following stipulations were inserted. "In consideration of this charter, a commission of five per cent. on the gross amount of freight is now due by the owners (ship lost or not lost) to G. & Co.," [who were the brokers who effected the charter] . . . "for which the owners hereby give them a lien on the freight, and with them the original charter party is to be deposited. Likewise, in consideration of this charter, the owners agree with G. & Co., that the vessel upon her return to Europe, is to be consigned to, and reported inwards at the custom-house by them or by their agents, at the out-ports or on the continent." In an action to recover compensation or damages upon the owners' neglect to make such consignment, it appearing that on the return of the ship there was £6,500 unpaid charter-money, and that the inward freight was £9,600;—*Held*, that it was erroneous to charge the jury that "if they should find that the five per cent. commission is compensation for collecting the amount of the unpaid charter-money" (i. e., the £6,500), "and that for all collections over and above what would be sufficient to pay the unpaid charter-money" (i. e., for collecting the £3,100), "full commissions of two and one-half per cent. are chargeable, then, in consequence of the breach by the defendants of the contract to consign, the plaintiffs have lost the opportunity of earning commissions for the collection of the freight of the return cargo, and are entitled to recover what they might have so earned." The jury might properly have been instructed that "the plaintiffs have lost the opportunity of earning commissions for the collection of the freight of the return cargo, and are entitled to recover what they might have so earned so far as it was not covered by the five per cent." *N. Y. Superior Ct.*, 1861, Weber *a.* Kingsland, 8 *Bosw.*, 415.

28. But though the instruction given was inconsistent in itself, yet the jury might have been misled by it; and a verdict for a sum nearly corresponding with two and one-half per cent. on the whole inward freight should be set aside. *Ib.*

29. It is proper to refuse a request to charge that the plaintiffs are not entitled to recover damages, on a ground on which they have not claimed to recover damages. *Ib.*

30. Plaintiff was arrested by a police officer, on defendant's request, or upon information furnished by him of facts and circumstances of suspicion: he was held in custody for some time, but no one appearing to make a complaint against him, he was discharged on his promise to appear again, if required;—*Held*, that a verdict for $2,000 damages

against defendant for this arrest and false imprisonment was excessive, and a new trial was granted. *Supreme Ct., II. Dist.*, 1863, Brown *a.* Chadsey, 39 *Barb.*, 253.

31. After a course of dealing by sales on credit for several years, the buyer, being required by the seller to furnish business paper, stated that he would give business paper of merchants designated by him, to be delivered whenever the seller required, and after about three weeks from the time of sales made on these terms, the buyer failed and assigned, owing a large amount, and having demands due him to only one-half the amount he owed, and but little merchandise which had not been pledged, but having no notes or other demands against the merchants, whose business paper he had agreed to give to the seller, except open accounts against some of them, which, together with his other demands, he had pledged to other creditors;—*Held*, that upon these facts, there was some evidence that the buyer was, and knew that he was, insolvent at the time of his purchases, and that in the absence of any explanation from him, a jury might find that his purchase was fraudulent. *N. Y. Superior Ct.*, 1861, King *a.* Phillips, 8 *Bosw.*, 603.

32. In such a case, the question ought to be submitted to the jury; and an order dismissing the complaint cannot be sustained. *Ib.*

Deposition, 3, 4; Evidence, 7–15, 41, 42, 55; Exception, 1–4; Executors and Administrators, 30; Justices' Courts, 5, 6; Reference; Waiver, 1.

TRUSTEES.

1. Where trust-money has been, by the trustee, so appropriated to his own use as to be undistinguishable from his individual means, his creditors, and especially those who have been misled by acts of his, inconsistent with the existence of a trust, are entitled to reach the trust-money as his.

So held, where the creation of the trust seemed suspicious, and the trustee had always employed the fund as his own in carrying on business. *N. Y. Superior Ct., Sp. T.*, 1858, Willett *a.* Stringer, *Ante*, 152.

2. Although the rights of *cestuis que trust* are more properly to be determined in an action by or against the trustee, yet the court will, in proper cases, allow them to come in and assert their claims. *Ib.*

3. This rule applied where a judgment was about to be rendered adverse to infant *cestuis que trust.* *Ib.*

4. *It seems*, that a trustee may maintain an action against his co-trustee to restrain a violation of duty, and even succeed in obtaining his re-

moval. *Supreme Ct., I. Dist., Sp. T.*, 1864, Bartlett *a.* Hatch, *Ante*, 461.

JUDICIAL SALE, 6; PARTIES, 10, 11.

UNDERTAKING.

1. The sureties in an undertaking given upon commencing an action to recover possession of personal property, under the Code, are liable thereon, notwithstanding the fact that having been excepted to by the defendant in that action, they failed to justify. [1 Hill, 557.] *Supreme Ct., III. Dist.*, 1862, Decker *a.* Anderson, 39 *Barb.*, 346.
2. Where an undertaking given on commencing an action to recover possession of personal property, binding the plaintiff to return the property if a return should be adjudged, and to pay any judgment that might be recovered—was made to the defendant, and not to the sheriff;—*Held*, that the defendant might sue on the undertaking without any assignment thereof to him. *Ib.*
3. In an undertaking given in proceedings of claim and delivery, the substitution of a new surety after exception to the original surety and his failure to justify, operates as an exoneration of the surety excepted to, notwithstanding the exception has been countermanded; and such original surety is not liable. *N. Y. Com. Pl.*, 1864, McIntyre *a.* Borst, 26 *How. Pr.*, 411.

APPEAL, 13, 15.

USURY.

EVIDENCE, 39.

VARIANCE.

1. An answer setting up the non-joinder of parties, alleged to be necessary co-plaintiffs in an action on contract, may be sustained by proof that some of the persons named for this purpose, are parties in interest. The defect of proof in not showing that all those named are such, presents a case of variance only, which may be disregarded unless the plaintiff has been misled. *N. Y. Superior Ct.*, 1861, Fowler *a.* The Atlantic Mutual Insurance Company, 8 *Bosw.*, 332.
2. In an action against the acceptor of a draft, a variance in stating the initial of the first name of the drawer is immaterial, and will not sustain a general denial of the complaint. *N. Y. Superior Ct.*, 1861, Claflin *a.* Griffin, 8 *Bosw.*, 689.

3. The rules as to variances between the complaint and the facts proved which may be disregarded under the Code—stated. *N. Y. Superior Ct.*, 1861, Poirer *a.* Fisher, 8 *Bosw.*, 258.
4. In an action on contract for the recovery of money, in which the complaint charged the defendant as agent and supercargo for the plaintiff, and with not accounting and paying over; the answer alleged, that the transaction was a joint adventure, and the referee so found;—*Held*, that it thus appearing that the defendant was indebted substantially as alleged in the complaint, the action should not be dismissed for this variance. *Ib.*
5. It makes no difference in such a case that the defendant had been arrested in the action, on the ground of the alleged agency. *Ib.*
6. In case of a variance in the return to a writ of certiorari, between the date of the order or proceeding returned and the date recited in the writ, it will be presumed in favor of the return that such variance is the result of a mistake which should be disregarded. *Supreme Ct., II. Dist.*, 1863, People *on rel.* Lord *a.* Robertson, 26 *How. Pr.*, 90.

VERDICT.

New Trial; Trial, 30.

WAIVER.

1. Serving a notice of trial is not a waiver of a motion previously noticed to strike out the answer in the cause as sham or false. *N. Y. Superior Ct.*, 1863, Beebe *a.* Marvin, *Ante*, 194.
2. *It seems*, that where defendant, after having excepted to the sureties in an undertaking, proceeded in the suit, without their justifying, and afterwards brought an action on the undertaking, it may be regarded as an election to waive the exception to the sureties. Dicker *a.* Anderson, 39 *Barb.*, 346.

Justices' Courts, 6; Reference, 6, 17; Trial, 2.

WILL.

1. What is a sufficient declaration and request on the part of the testator, in executing the instrument. Gamble *a.* Gamble, 39 *Barb.*, 373.
2. Mere absence of an attesting witness from the State, abroad on a journey or tour, does not authorize proof of the will by proving the handwriting of the testator and of the witness. *Niagara Surr. Ct.*, 1859, Stow *a.* Stow, 1 *Redf.*, 305.

3. The statute providing for such proof where all or any of the witnesses "reside" out of the State (3 *Rev. Stat.*, 5 ed., 139, 140, §§ 9, 12), imports something more than mere absence from the State. The witness must reside out of the State. *Ib.*
4. A legatee under a will made prior to the one offered for probate, though neither an heir at law nor next of kin of the deceased, may intervene to oppose the probate of the subsequent will. *Kings. Surr. Ct.*, 1854, Turhune *a.* Brookfield, 1 *Redf.*, 220.
5. Part of a will may be refused probate in consequence of undue influence in regard to it, and the residue admitted. *N. Y. Surr. Ct.*, 1849, *In re*, Welsh, 1 *Redf.*, 238; S. C., 7 *N. Y. Leg. Obs.*, 153.
6. On proceedings for probate of a will, a claim of interest, positively sworn to, will make the claimant a contestant before the court, and a party to the proceedings. *N. Y. Surr. Ct.*, 1863, Norton *a.* Lawrence, 1 *Redf.*, 473.
7. Objections to the probate of a will, on the ground of its want of due execution, being filed by certain infants claiming to be legitimate grand-children of the deceased, it is not necessary to try the question of the interest of the objectors before proceeding to the question of due execution. The issues of interest and of due execution do not constitute separate and distinct proceedings. *Ib.*
8. The appearance of an interested party in open court, on the return day, though not served with citation, entitles him to be heard. *Ib.*

EVIDENCE, 3.

WITNESS.

1. Before the act of 1860, as well as since the amendment of 1862, husband and wife were not in general admissible as witness for and against each other. *N. Y. Superior Ct.*, 1863, Moffat *a.* Mount, *Ante*, 4.
2. Husband and wife cannot be witnesses on their own behalf for or against each other, except so far as, by the rule of court in respect to divorce cases, the restriction has been relaxed in favor of the wife, in cases of cruel treatment by the husband, in the absence of any other witness competent to testify. *Supreme Ct.*, 1863, Bihin *a.* Bihin, *Ante*, 19.
3. According to the weight of authority in the Supreme Court of this State, husband and wife are competent as witnesses for or against each other; and where one of them is admitted to testify, and says anything which bears upon the case as sustaining the other, there can be

no restriction on cross-examination which will not apply to any other witness. *N. Y. Superior Ct.*, Aiken *a.* Baumann, *Ante*, 28, *note.*

4. On an accounting, before a surrogate, one of the executors offered himself as a witness to prove that certain property had never been in the executors' possession, but had been given by the testator in his lifetime to his daughter, the wife of the witness, who was also a residuary legatee under the will;—*Held*, that the testimony offered was not in violation of the common law rule that a husband cannot testify in his wife's favor, and must be admitted. *N. Y. Surr. Ct.*, Sneckner *a.* Taylor, 1 *Redf.*, 427.

5. A witness who is an expert may state in what respect the character of the handwriting of a note, the genuineness of which is questioned, differs from certain notes in receipts of the party conceded to be genuine. *Supreme Ct., II. Dist.*, 1863, Dubois *a.* Baker, 40 *Barb.*, 556.

6. It is not competent for a party calling a witness whose credit has been impeached by the production of a record of his conviction of larceny, to give evidence explanatory of the conviction, and in favor of the witness's innocence of the crime, notwithstanding the conviction. *Supreme Ct., VII. Dist.*, 1863, Gardner *a.* Bartholomew, 40 *Barb.*, 325.

7. A witness who testifies that he is somewhat familiar with railroad brakes and with the operation of them, and has used them on a railroad and knows which are the best brakes, is a competent witness to testify as to the distance within which any given train can be stopped, with a designated class of brakes and a given number of brakemen. *N. Y. Superior Ct.*, 1861, Mott *a.* Hudson R. R. Co., 8 *Bosw.*, 345.

8. The disqualification of a witness who has been convicted of felony, unless pardoned, extends to all cases where the declaration is to be used in a judicial proceeding for the purpose of establishing or proving some fact; and it applies to both written and oral evidence. *Supreme Ct., II. Dist.*, 1863, People *on rel.* Lord *a.* Robertson, 26 *How. Pr.*, 90.

9. The testimony of a witness employed to watch and detect a husband or wife suspected of adultery, though it is competent, and ought not to be absolutely rejected, is to be received with great caution, and scrupulously and minutely scrutinized. *N. Y. Superior Ct.*, Anonymous, *Ante*, 48.

10. The fact that a witness is a prostitute, and the keeper of a house of ill-fame, does not warrant an entire rejection of her testimony; but a conviction of adultery should not be founded on facts established by her evidence solely. *Ib.*

11. So, where the circumstances as to which she is corroborated do not

inevitably lead to the conclusion that adultery has been committed, her testimony is insufficient. *Ib.*

12. Bad repute of a witness in former years, of such a degree as to destroy his credibility, is treated as continuing, until, by the production of full evidence, a change of reputation from change of conduct is shown. *Ib.*

DEPOSITION, 1, 2; EVIDENCE, 60–63, *and tit.* III. *Opinions of Witnesses.*

THE END.

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